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No._____

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In The Supreme Court of the United States

October Term 1992

WOODS PETROLEUM CORPORATION,
Petitioner,

versus

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR, SECRETARY OF THE INTERIOR, ANADARKO AREA DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, AND CONCHO INDIAN AGENCY SUPERINTENDENT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

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QUESTIONS PRESENTED FOR REVIEW

1. May courts deprive the Secretary of the Interior of his congressionally conferred discretionary authority to evaluate and approve the manner and timing of oil and gas development on federally-controlled Indian land?

2. May courts, consistent with the Due Process Clause of the United States Constitution and the Administrative Procedure Act, mandate a discretionary administrative decision of the Secretary of the Interior in order to deprive a mineral lessee of a vested property interest?

PARTIES TO THE PROCEEDING

Plaintiff Cheyenne-Arapaho Tribes of Oklahoma has also named in the caption of this action the former Secretary of Interior, William P. Clark, the former Area Director of the Anadarko Area Office of the Bureau of Indian Affairs, William P. Ragsdale, and the former Superintendent of the Concho Indian Agency of the Bureau of Indian Affairs, Tom Dowell.

Woods Petroleum Corporation has been renamed Woods Research and Development Corporation. Its parent company is Sunshine Mining Company. There are no subsidiary companies.

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REFERENCE TO OPINIONS RENDERED BY COURTS AND AGENCY

A. June 5, 1992, Judgment and Opinion of United States Court of Appeals for the Tenth Circuit, rehearing denied November 2, 1992. Certiorari Appendix (''Cert. App.'') at 1. This opinion is published at 966 F.2d 583 (10th Cir. 1992).

B. May 26, 1989, Order, certified for appeal, of United States District Court for the Western District of Oklahoma. Cert. App. at 18.

C. November 13, 1986, Order of United States District Court for the Western District of Oklahoma, remanding for additional findings and retaining jurisdiction. Cert. App. at 61.

D. March 26, 1987, Response of United States of America to Court's Order dated November 13, 1986. Cert. App. at 86.

E. March 27, 1987, Supplement to Response of United States of America. Cert. App. at 99.

F. May 18, 1984, Opinion of Interior Board of Indian Appeals on Reconsideration, 91 I.D. 229. Cert. App. at 110.

G. October 25, 1983, Response of Government Appellee to Interior Board of Indian Appeals. Cert. App. at 000.

H. February 10, 1983, Opinion of Interior Board of Indian Appeals, 90 I.D. 61. Cert. App. at 137.

I. February 9, 1982, Decision of Deputy Assistant Secretary, Indian Affairs, Operations. Cert. App. at 153.

J. November 2, 1992, Order denying rehearing, United States Court of Appeals for the Tenth Circuit. Cert. App. at 155.

JURISDICTIONAL STATEMENT

Date of entry of judgment or decree to be reviewed: Judgment in accordance with the opinion of the Court of Appeals was entered on June 5, 1992.

Date of any order respecting rehearing: Petitions for rehearing filed by both Woods Petroleum Corporation and by Cheyenne-Arapaho Tribes of Oklahoma were denied November 2, 1992. This Petition is filed within the time allowed by law. 28 U.S.C. § 2101(c); Supreme Court Rule 13.4.

Statutory provision conferring Supreme Court jurisdiction: Jurisdiction in this Court is conferred pursuant to 28 U.S.C. § 1254(1).

Statement regarding nature of interlocutory appeal: This case was submitted to the Court of Appeals based on the grant by the District Court of a Petition for Permission to Appeal under 28 U.S.C. § 1292(b). As a result of its opinion below, the Court of Appeals, "effectively dispose[d] of this action" (Cert. App. at 8). In doing so, the Court of Appeals supplanted the Secretary's exercise of administrative authority with its own judicial opinion, vacated the administrative order in question, and affirmed the District Court's decision without remand for the proper exercise of administrative discretion by the Secretary.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Each of the pertinent Constitutional, statutory and regulatory provisions is fully set forth in the Certiorari Appendix. Cert. App. at 157.

No._____

In The Supreme Court of the United States

October Term 1992

WOODS PETROLEUM CORPORATION,
Petitioner,

versus

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR, SECRETARY OF THE INTERIOR, ANADARKO AREA DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, AND CONCHO INDIAN AGENCY SUPERINTENDENT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Beginning in 1978, as a result of the federal pricing scheme contained in the Natural Gas Policy Act (the

"NGPA"), the development of natural gas found in the Anadarko Basin of Oklahoma became economically feasible. Higher NGPA pricing permitted oil and gas exploration companies to assume the financial risk of drilling extremely deep (up to three miles in depth) and expensive (at times in excess of $10 million) wells for the production of Anadarko Basin natural gas.

In order to accomplish the orderly exploration and production of oil and gas, federal and state authorities have imposed the concept of communitized drilling. Communitization occurs when administrative orders join contiguous mineral and leasehold interests into a unit for the drilling of a single well and for the proportionate sharing of the costs of and production from the unit well drilled. As a result of communitization, all mineral leases within a unit are "held by production" from the unit well.[1] When this communitization includes mineral interests owned by protected American Indians, federal approval of the plan

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[1] The mineral leases here, as is typical, contain a "primary term" during which actual drilling was required in order to maintain the leases, and a "secondary term" during which actual production was required to continue the leases in effect. The approval of communitized development of these leases prohibited Woods from drilling more than a single "unit well" on a unit. Woods, thus, was forced to rely on production from the single unit well to preserve all of the leases within the unit after the expiration of their primary terms. *See* 30 C.F.R. §§ 221.11, 221.21(a).

of communitized development is required.[2] The discretionary authority to grant this federal approval has been congressionally conferred exclusively upon the Secretary of the Interior and his delegates (the "Secretary").[3] Here, the District Court and the Court of Appeals have imposed their own independent judicial conclusion and thereby precluded the exercise of the Secretary's express grant of discretionary authority.

Respondent, Cheyenne-Arapaho Tribes of Oklahoma (the "Tribe"), is the owner of mineral rights subject to six 160-acre oil and gas leases located in Custer County, Oklahoma. Woods Petroleum Corporation ("Woods") is the lessee of four of these tracts pursuant to these mineral leases which were properly approved in 1976 by the Area Director of the BIA (the "Tribal Leases").

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[2] In conformance with a long-standing federal policy requiring unitized or communitized development of oil and gas, dating back to the early part of this century, lessees of Indian minerals in the Anadarko Area in Oklahoma are required to obtain a state spacing order which establishes a unit for the drilling of a single well, and to submit this order to the Area Director of the Bureau of Indian Affairs (the "BIA") for federal approval as part of an agreement (a "communitization agreement") to be bound by the state-ordered communitization plan. *See Montana Eastern Pipe Line Co.*, 55 I.D. 189 (1935). *See generally Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939); *Phillips Petroluem Co., v. Peterson*, 218 F.2d 926 (10th Cir. 1954), *cert. denied*, 349 U.S. 947, 75 S. Ct. 871, 99 L. Ed. 2d (1273 (1955).

[3] As a matter of federal regulation, the Secretary has delegated his authority to grant administrative approval to the various Area Directors of the Bureau of Indian Affairs. *See* Secretarial Order 3010, 42 F.R. 53682; 40 F.R. 17046.

Pursuant to the Tribal Leases, Woods paid the Tribe for the right to commence drilling during the five-year primary terms of each lease. Tribal Leases, ¶ 1. The Tribal Leases provide:

> The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

Id., ¶ 9.

In 1981, within the primary term of each Tribal Lease, Woods submitted to the BIA for approval two agreements, seeking to form two separate units,[4] each "communitiz[ing] all of the oil and gas leases described [including the Tribal Leases] in order to form one communitized area . . . [such that oil and gas] produced from the communitized area shall be allocated among the leaseholds comprising said communitized area in the proportion that the acreage interest of each leasehold . . . bears to the entire acreage interest committed hereto" (the "Woods Communitization Agreements"). The Woods Communitization Agreements also provide: "[T]he actual drilling, completion . . . or production of a well or wells for [oil and gas] on the communitized area shall be construed and considered as the

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[4] A map of the two communitized areas involved in this case is found in the administrative record and is reproduced in the Appendix. Cert. App. at 136.

actual drilling, completion . . . or production from each and all of the lands within and comprising said communitized area."[5]

The Woods Communitization Agreements were approved in a three-stage administrative process by the United States Geological Survey supervisor, the Concho Agency superintendent, and the Anadarko Area Director of the BIA, all prior to the expiration of the Tribal Leases. After this review and analysis, confirming that the best interests of the Indian lessor had been fully considered, the Deputy Assistant Secretary of the Interior and the Interior Board of Indian Appeals affirmed the approval of the Woods Communitization Agreements. This approval was contested by the Tribe throughout the administrative process.

On subsequent judicial review in the District Court, the Tribe sought narrow relief, alleging, as they did in administrative process, that the Secretary's approval of the Woods Communitization Agreements was improper and that, despite timely drilling of a unit well, the Tribal Leases had expired. The basis for this contention was that the Secretary did not consider the amount of acquisition bonus the Tribe might receive if the Secretary were to cause the Tribal Leases to expire by deferring approval of the Woods Communitization Agreements until after the primary terms

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[5] This language has been approved by the BIA as part of its 1981 Revised Form of communitization agreement. *Cheyenne & Arapaho Tribes v. Deputy Assistant Secretary*, 91 I.D. 229, 233, 12 I.B.I.A. 241 (1984) (this case below). *See Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416 (10th Cir. 1984).

of the Tribal Leases. The Tribe did not, however, challenge: (a) the approved 640-acre communitized units, (b) the language of the Woods Communitization Agreements, or (c) the Secretary's decision to approve communitization. The Tribe simply attacked *the effective date of communitization* by challenging the Secretary's decision to approve the Woods Communitization Agreements prior to expiration of the Tribal Leases. The Tribe thus sought communitization of its interests in 640-acre spacing areas, exactly the areas which the Secretary had approved, but sought to defer approval until after the Tribal Leases purchased by Woods had expired.

In rejecting the Tribe's challenge, the Secretary reasoned that such a capricious manipulation of the approval process would be inconsistent with Woods' rights under the Tribal Leases. This conclusion was specifically based upon the fact that Woods had paid for the right to preserve its leases by drilling a single unit well during the primary term of the Tribal Leases. *See* Cert. App. at 94, 97-98, 117-18, 127-28, 135.

The District Court supplanted the Secretary's analysis with its own conclusion. The District Court held that the Secretary's approval of the Woods Communitization Agreements was unlawful because the Tribe might have obtained more money by allowing the Tribal Leases to Woods to expire and then by granting new leases. By invalidating the Secretary's approval, the District Court achieved the result it sought – it caused the Tribal Leases to expire. This

lease expiration would result, the District Court said, because there was no production from each individual lease to maintain it at the end of its primary term.[6] The effect of this ruling was to cause a forfeiture of Woods' leases for its compliance with federal law prohibiting it from drilling a well on each lease necessary to preserve it. *See* 30 C.F.R. § 221.21(a).

On appeal, the Court of Appeals affirmed the District Court's conclusion that the Secretary's review was incomplete because he had failed to consider, in his review and approval of the Woods Communitization Agreements, the value of a new lease acquisition bonus to the Tribe. Rather than continuing the approval process by remanding the Woods Communitization Agreements to the Secretary for his exercise of discretion, the Court of Appeals terminated the approval process by declaring the Woods Communitization Agreements void.

Basis for federal jurisdiction in the court of first instance. Jurisdiction in the District Court was predicated upon three sections of title 28 of the United States Code:

Section 1331 (federal question);

Section 1361 (action in the nature of mandamus); and

Section 1362 (Indian tribe plaintiff).

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[6] The fourth Tribal Lease remained in effect due to Wood's actual drilling of the unit well on that lease.

REASONS FOR GRANTING REVIEW

I. THE COURTS BELOW HAVE USURPED THE SECRETARY'S AUTHORITY TO REGULATE OIL AND GAS DEVELOPMENT ON INDIAN LANDS

Congress has expressly conferred upon the Secretary of Interior the authority to require and the discretion to approve the communitized development of restricted Indian lands.[7] The Secretary has gone to great lengths to exercise that discretionary authority both generally and specifically in this case, as the record shows. [8] The courts below have improperly usurped this Congressional grant of authority by rendering the approval of the Woods Communitization Agreements void without remand. The Court of Appeals has decided *de novo* how the Secretary *should have ruled* had he con-

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[7] Section 4 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396d, provides:

> In the *discretion of the said Secretary,* any lease for oil or gas issued under the provisions of sections 396a-396g of this title *shall be made subject to the terms of any reasonable cooperative unit or other plan* approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

Id. (emphasis added). This provision has been implemented through the promulgation and administrative interpretation of 25 C.F.R. § 171.21. *See* Memorandum to All Area Directors, Cert. App. at 107.

[8] The Secretary has promulgated extensive guidelines for the review and approval of proposed communitization agreements. *See Cotton Petroleum Corp. v. United States Dept. of Interior,* 870 F.2d 1515, 1517-19 (10th Cir. 1989). These guidelines have been reviewed, explained and endorsed by the court below. *Id.* at 1525-27.

sidered the omitted factor, rather than remanding this matter to allow the Secretary, as required by law, to determine communitization with the additional factor announced by the court. This *judicial* intervention in the administrative oversight of communitized development is an unprecedented usurpation of the Secretary's congressionally conferred authority and presents an important question of federal law that has not been, but should be, settled by this Court.

Congress has strictly limited the role of the judiciary under the Administrative Procedure Act to a correction of errors in the administrative process. Substitution of a court's judgment for an agency's discretion has been uniformly prohibited.[9] In the words of this Court:

> Section 706(2)(A) [of the Administrative Procedure Act] requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate

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[9] *See Rust v. Sullivan*, ___ U.S. ___, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991); *Mobil Oil Exploration & Producing S.E. Inc. v. United Distribution Cos.*, ___ U.S. ___, 111 S. Ct. 615, 112 L. Ed. 2d 636 (1991); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 97 S. Ct. 891, 51 L. Ed. 2d 1 (1977); *Dunlop v. Bachowski*, 421 U.S. 560, 95 S. Ct. 1851, 44 L. Ed. 2d 377 (1975); *Camp v. Pitts*, 411 U.S. 138, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973).

> standard of review is a narrow one. *The court is not empowered to substitute its judgment for that of the agency.*

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971) (citations omitted) (emphasis added). In *National Indian Youth Council v. Bruce,* 485 F.2d 97 (10th Cir. 1973), *cert. denied,* 417 U.S. 920, 94 S. Ct. 2628, 41 L. Ed. 2d 226 (1974), the Court acknowledged:

> Courts cannot substitute their judgment for that of those working with Indians, empowered to exercise discretion. In no event should a court direct the manner in which discretionary acts are to be performed, nor may it direct or influence the exercise of discretion in making that decision.

Id. at 99-100 (citations omitted). *See Sierra Club v. Hodel,* 848 F.2d 1068, 1092-93 (10th Cir. 1988) (''[T]he district court's finding of no significant impact unlawfully usurped the agency's dominion over that issue.'').

This distinct division between the exercise of administrative authority and limited judicial review, however, has been ignored by the courts below. Once the Court of Appeals determined that the Secretary was required to consider the additional factor of economics in his analysis, the court was bound to remand this matter to the Secretary for *his* exercise of discretion. The courts' failures to do so constitute an unlawful usurpation of the Secretary's discretionary authority. By their rulings, the courts below have done exactly what the law prohibits, to ''substitute . . . [their]

judgment for that of the agency." *Citizens to Preserve Overton Park,* 401 U.S. at 416. Certiorari is, thus, proper to remedy this error.

II. THE RULINGS BELOW CONFLICT WITH THE RULING OF ANOTHER CIRCUIT PROTECTING THE PROPERTY RIGHTS OF MINERAL LESSEES

The courts below have disapproved proper communitization agreements in order to cause the termination of Tribal leases within the units. These rulings unconstitutionally deprive Woods of its property and conflict with the ruling of another circuit.

By effectively terminating Woods' property interests in three of its four Tribal Leases, the rulings below are directly contrary to the law announced in *United Nuclear Corp. v. United States,* 912 F.2d 1432 (Fed. Cir. 1990), holding that the refusal of the Secretary to approve a rational and proper plan for development of an Indian mining lease at the request of tribal authorities, in order to force the lessee "to pay more money or to cause the lease to lapse," was an unlawful taking of the lessee's vested property rights in the lease in violation of the Fifth Amendment to the United States Constitution. *Id.* at 1438. Under the teaching of *United Nuclear,* the Secretary here would have breached a duty to Woods, and thus would have acted unlawfully, if he had refused to approve the admittedly proper communitization agreements solely to allow the Tribe to reacquire mineral interests leased to Woods.

The rulings below are also inconsistent with the Court of Appeal's prior mandate in *Cotton Petroleum Corp. v. United States Department of Interior,* 870 F.2d 1515 (10th Cir. 1989). In *Cotton*, the Secretary attempted to accomplish exactly what the courts below have done here, *i.e.,* to disapprove communitization of an Indian tract in order to allow an existing lease to expire, but to approve communitization of the same tract as unleased land. In *Cotton*, the Court of Appeals specifically held that the disapproval of a reasonable communitization agreement could not be used as a device to cause Indian leases to expire. In rejecting such an attempt as unlawful, the court stated:

> Here, neither the Secretary nor any other government office reviewing the communitization agreement found any fault with it. There was no substantial argument that the communitization agreement was not fair, or that the [Indian lessors] were not getting the economic benefits under it for which they had bargained. *Instead of evaluating the communitization agreement on its merits, the Secretary used its rejection as a triggering event to cause the termination of a separate instrument, the lease.*

Id., at 1527-28 (citations omitted) (emphasis added). Based on this analysis, the court reinstated the administrative approval of communitization because, like here, communitized development was indisputably proper and desired by both the lessees and the Indian lessors. The very result

rejected in *Cotton*, however, is required by the courts' opinions below.[10]

The actual effect of the Court of Appeal's opinion is to conclude that, if the Secretary had considered the economic value of new leases, he would have ignored all other relevant factors supporting communitized development and disapproved the Woods Communitization Agreements in order to cause the Tribal leases to terminate. This conclusion places the opinion below squarely within the prohibition of *Cotton*.[11]

Thus, the Court of Appeals has set aside a proper exercise of agency discretion and has judicially accomplished

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[10] The Court of Appeals declined to apply its own holding in *Cotton*, stating: "This is not a *Cotton* situation . . . . [A]lthough our holding today has the ultimate effect of denying the communitization agreements, that effect is merely the aftermath of the Secretary's failure to consider the prerequisite relevant economic factors in his decision to approve the agreements." Cert. App. at 16, n.14. This analysis is a distinction without a difference because the only relevance of the court's evaluation of this economic factor is to cause lease termination and, as admitted by the Court of Appeals, the "ultimate effect" is the same. *Id.*

[11] The Court of Appeal's opinion rejects the Secretary's approval of a 640-acre communitized unit, but purports to allow the Indian mineral owners to share in unit production revenues attributable to the excluded tracts as if they were in the unit. Cert. App. at 7. This result was precluded by the Court in *Cotton* when it stated: "The Secretary cannot . . . preserve the [Indians'] clear economic interest in remaining in the unit without reinstating the Area Director's decision [to approve the unit]." *Cotton*, 870 F.2d at 1528. The court concluded that a decision to attribute unit drilling and production to Indian tracts but not to the Indian leases was necessarily both arbitrary and capricious. *Id.* at 1528, n.4.

an unlawful and unconstitutional result. Again, certiorari is proper to remedy this error.

CONCLUSION

Woods Petroleum Corporation respectfully requests the Court to grant its Petition for Writ of Certiorari and to review the decision of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Filed June 5, 1992

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA,

Plaintiff-Appelle and Cross-Appellant

vs.

THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR; WILLIAM P. CLARK, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR; WILLIAM P. RAGSDALE, INDIVIDUALLY AND AS AREA DIRECTOR, ANADARKO AREA OFFICE, BUREAU OF INDIAN AFFAIRS; TOM DOWELL, INDIVIDUALLY AND AS SUPERINTENDENT, CONCHO INDIAN AGENCY, BUREAU OF INDIAN AFFAIRS,

Defendants,

and

THE WOODS PETROLEUM CORPORATION,

Defendent-Appellant and Cross-Appellee.

Nos. 89-6270 & 89-6355

APPEAL FROM A CERTIFIED INTERLOCUTORY ORDER
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
D.C. NO. CIV-84-1769-A

Before ANDERSON and BRORBY, Circuit Judges, and BRIMMER, Chief District Judge.*

BRIMMER, Chief District Judge

*Honorable Clarence A. Brimmer, Chief U.S. District Judge for the District of Wyoming, sitting by designation.

This action seeking judicial review of the decision of a federal agency was initiated by the plaintiff, Cheyenne-Arapaho Tribes of Oklahoma (hereinafter "Tribe") on July 17, 1984. Jurisdiction of the district court was based upon 28 U.S.C. §§ 1331 and 1362.[1] This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(b)[2]. The district court certified its order for appeal on May 26, 1989. This Court granted appellant Woods Petroleum Corporation's (hereinafter Woods) petition to take an interlocutory appeal on July 24, 1989, and Tribe's petition for cross-appeal on October 20, 1989. The United States did not take an interlocutory appeal.

Background

The district court's summary judgment ruling overturned the Bureau of Indian Affairs' (hereinafter BIA) 1981 decision to approve two communitization agreements unitizing

[1] 28 U.S.C. § 1362 gives original jurisdiction to all civil actions brought by any recognized Indian tribe. As per the Tribe's complaint, its claims fall under the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a to 396g; the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706; the due process clause of the Fifth Amendment to the Constitution of the United States; and certain regulations of the United States Department of the Interior ("Department").

[2] 28 U.S.C. § 1292 allows interlocutory orders to be appealed in the discretion of the district court. The interlocutory order appealed from in this case was a partial grant and partial denial of summary judgment to the Tribe.

oil and gas operations on two 640-acre spacing units (Sections 29 and 32) owned by the Tribe in Custer County, Oklahoma. Woods had four oil and gas leases in Sections 29 and 32, each covering 160 acres, which were approved by the Concho Agency Superintendent on May 10, 1976.[3] Reading and Bates Petroleum Company acquired two leases covering 160 acres each in Sections 29 and 32 on February 22, 1980.[4] The primary term of each lease was for 5 years and as much longer thereafter as oil and/or gas was produced in paying quantities. Each of the 1976 leases contained a commence drilling clause, which purported to extend the lease if drilling was commenced during the primary term.

Each lease also contained a unit operation clause (hereinafter Clause 9) which dealt with communitization[5] by providing that:

> The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the lease lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

Under a communitization agreement, drilling operations conducted anywhere within the unit area are deemed to occur

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[3] The Woods leases in Custer County, Oklahoma were Number 14-20-205-6895, covering the NE/4, section 32-14N-20W; Number 14-20-205-6896, covering the NW/4, section 32-14N-20W; Number 14-20-205-6897, covering the SE/4, section 32-14N-20W; and Number 14-20-205-6894, covering the SW/4, section 29-14N-20W.

[4] The Reading and Bates Leases were Number 14-20-205-7672, covering the NE/4, section 29-14N-20W and Number 14-20-205-7675, covering the SW/4, section 32-14N-20W.

[5] The terms communitization and unitization are used synonymously in this opinion.

on each lease within the communitized area and production anywhere within the unit is considered to be produced from each tract within the unit. *Kenai Oil & Gas, Inc. v. Dept. of Int. of U.S.*, 671 F.2d 383, 384 (10th Cir. 1982). Communitization agreements formed pursuant to Clause 9, in conjunction with the commence drilling clause, thus extend the terms of all the leases if drilling is commenced on any lease within the units covered by the agreements.

Since the five year leases signed in 1976 would have expired on May 10, 1981, a flurry of activity occurred among the lessees prior to that date. Woods and Reading and Bates, as owners of the leases in sections 29 and 32, agreed on April 1, 1981 to communitize the tracts and leases in each section for unitized drilling and production. The communitization agreements designated Reading and Bates as the operator of the unit wells in both sections. Reading and Bates Petroleum Company requested the Tribe's approval of the proposed communitization agreements by letter dated April 15, 1981. The USGS issued a permit on April 22, 1981 authorizing Reading & Bates to commence drilling operations in Section 32. On April 22 and April 23, 1981, the chairman of the Tribe's business committee and the Tribe's business manager met with the Reading and Bates representative and officials from the Anadarko Area Office of the BIA and explained that they would not agree to the communitization agreements unless the 1976 leases were renegotiated. Tribal officials requested a lease bonus of $1500 per acre as well as a ten percent back-in working interest in the Woods leases. Reading and Bates rejected any renegotiations of the Woods leases on May 1, 1981.

By letter dated May 1, 1981, Reading and Bates demanded that the Tribe assent to the communitization agreements. The letter stated that in the event the leases were lost, Reading and Bates would "pursue every legal remedy" in order to receive restitution for the losses that it might

sustain.[6] On May 5, 1981, Reading and Bates submitted the proposed communitization agreement to the United States Geological Survey (USGS) for approval. The USGS recommended approval of both agreements on the basis that they appeared to offer adequate protection to the restricted Indian interests. On May 8, 1981, the Acting Area Director of the Anadarko Office of the BIA approved both communitization agreements.

On August 5, 1981, the Tribe filed a notice of appeal of the Area Director's decision to approve the communitization agreements. Subsequently, on February 9, 1982, the Deputy Assistant Secretary of the Department of the Interior affirmed the Acting Area Director's decision. The Tribe then appealed this decision to the BIA. On February 10, 1983, the BIA entered an order affirming the Anadarko Director's decision. The BIA then granted the Tribe's petition for rehearing and called for supplementation of the record so that the reasons for the Area Director's approval of the agreements could be set forth in more detail. Upon consideration of supplemental materials, the BIA entered an order on May 18, 1984 reaffirming the Area Director's May 1981 decision to approve the communitization agreements.

The Tribe then commenced an action in the United States District Court for the Western District of Oklahoma. The fundamental issue before the district court was whether the BIA's approval of the communitization agreements extended the primary terms of certain leases on the Tribe's land. Subsequently, summary judgment motions were filed by the parties. Upon review of the record, the district court concluded that the administrative record was inadequate to resolve the issues raised. The court remanded the case to the Secretary of the Interior with instructions to respond

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[6] Ad. Rec. at 678.

to particular questions presented by the court. After the Secretary entered his response to the Order of Remand, the parties filed a second round of summary judgment motions. This appeal is from the order on those motions.

In the action below, Woods contended that the issues raised by the Tribe were not properly before the district court because the Tribe's administrative appeal of the approval of the communitization agreements was not timely. The court below disagreed, finding that the Tribe did not receive written notice as per 25 C.F.R. § 2.4, and concluding that the Tribe's filing of its appeal on August 5, 1981 was not untimely under 25 C.F.R. § 2.10. In addition, the district court found that Woods failed to demonstrate that it had been prejudiced by the delay in the filing of the Tribe's appeal. Since the Tribe's administrative appeal was timely, the district court declared that the issues raised by the Tribe were properly before it.

The district court found that the record did not establish that the parties to the 1976 leases intended Clause 9 (the unit operation clause) to require particularized tribal consent to each communitization agreement. The court analyzed the language of Clause 9, and found that the provision constituted a blanket consent to future communitization agreements. There was no finding of a fundamental conflict between the blanket consent interpretation of Clause 9 and the policies underlying the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a to 396g (hereinafter MLA). In addition, the district court interpreted the law existing in 1976 when the leases were executed as supporting the blanket consent interpretation of Clause 9. The court concluded that lack of Tribal consent did not invalidate the communitization agreements. The district court also found that the Area Director breached his trust responsibility to the Tribe under the MLA by approving the communitization agreements without studying the economic conditions prevailing at the

time. As a result of this breach of trust, the court held that the communitization agreements did not extend the non-drilling 1976 leases, and those leases thus expired at the end of the primary terms. The district court denied the Tribe's cross-motion for partial summary judgment on the the issue of whether the Woods' leases violated the MLA, holding that the commence drilling clauses of the leases operated to extend those leases if drilling was commenced during the primary term set forth in the habendum clauses. The court denied the Tribe's cross motion for summary judgement on the issue of whether Woods' leases were amended by the communitization agreements to condition extension beyond their primary terms on production rather than drilling, on the basis that the matter had not been properly raised at the administrative level.

As a result of the court's ruling, three leases on which no drilling occurred during their primary terms expired on May 10, 1981.[7] Consequently, as of May 10, 1981, the Tribe was the rightful owner of all the working interest and the royalty interest in those tracts, and was thus entitled to certain revenues attributable to the tracts after May 10, 1981.

Appellate Contentions

On appeal, Woods contends that (1) the administrative appeal of the Tribe was not timely, and that (2) the district court improperly substituted its own economic judgment for that of the Department in determining whether or not to approve the communitization agreements.

In discounting Woods' argument that the Tribe's appeal of the administrative action was not timely, the Tribe notes that it never received formal written notice of the adverse administrative action as required by 25 C.F.R. § 2.4. The

[7] Those leases were Numbers 14-20-205-6894, 14-20-205-6895 and 14-20-205-6897.

Tribe replies that the district court was correct in its ruling that the Secretary of the Interior breached his trust responsibility to the Tribe by failing to consider current economic conditions *prior to approving the communitization* agreements. The Tribe also contends that the district court's interpretation of Clause 9 is inconsistent with the intent and purpose of the Mineral Leasing Act to maximize tribal control. In addition, the Tribe claims that all four leases expired for failure to achieve production in paying quantities before the end of the primary term because the commence drilling clause is in conflict with MLA and, thus, unlawful.

Since our ruling on Woods' contentions will effectively dispose of this action, the Court will address its opinion only to the timeliness issue and the question of whether the Secretary should have considered economic factors.

I.

Standard of Review

The Circuit Court of Appeals reviews the district court's grant or denial of a summary judgment motion by applying the same legal standard employed by the district court under Rule 56(c) of the Federal Rules of Civil Procedure. *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 613 (10th Cir. 1988); *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). Summary judgment should be granted, and will be affirmed, only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In applying this standard, the court must examine the factual record and make reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Gray v. Phillips Petroleum Co.*, 858 F.2d at 613. The Standard provides that the mere existence of *some* factual dispute will not frustrate an otherwise proper summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

The court must decide if the substantive law was correctly applied. *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d at 143. The appellate court applies a *de novo* standard of review to all legal determinations made by the district court. *Goichman v. City of Aspen*, 859 F.2d 1466, 1467 (10th Cir. 1988). The court may affirm the grant or denial of summary judgment if any proper ground exists to support the lower court's ruling. *Id.* at 1468. Affirmance of summary judgment need not be based on the grounds relied upon by the district court, but may be based on any proper grounds for which the record is sufficient to permit conclusions of law. *Griess v. Colorado*, 841 F.2d 1042, 1047 (10th Cir. 1988).

II.

Was the Administrative Appeal Timely?

Woods contends that the district court should have dismissed the Tribe's claims for failure to commence the administrative appeal within the mandatory thirty-day period prescribed by regulation. The communitization agreements at issue in this case were approved by the Anadarko Area Office on May 8, 1981. The Tribe did not file its administrative appeal until August 5, 1981. Woods argues that the Tribe knew that the agreements had been approved, and yet indulged in a prejudicial delay of 89 days before filing the appeal.[8] Woods claims that the Tribe received actual, personal notice of the decision from Reading and Bates on May 9, 1981 and had received copies of the communitization agreements prior to May 9.

The record reflects, however, that the Tribe did not receive notice in writing given by the official making the decision or taking the action. Pursuant to 25 C.F.R. § 2.4, failure

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[8] There is no evidence in the record to indicate how, or indeed if, Woods was prejudiced.

to give such notice extends the time in which appeal from the decision may be taken.[9] The regulation is explicit: when proper notice has not been given, the right to appeal continues until such notice is received. The Tribe's appeal was timely.

III.

Should the Secretary Have Considered Economic Factors?

The proper function of courts when reviewing an administrative order is to assure that the relevant factors were considered by the agency and that the decisionmaker made no clear error of judgment. *Kenai Oil & Gas, Inc. v. Department of Interior*, 671 F.2d 383, 386 (10th Cir. 1982). Appellant Woods claims that the district court abused that function by (1) substituting its own views for those of the agency upon economic judgments within the discretion of the agency, and by (2) considering irrelevant factors. We disagree with both contentions.

Approval of communitization agreements falls within the discretion of the Secretary of the Interior pursuant to 25 U.S.C. § 396d, which states that:

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a-396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or

[9] The 1981 text of 25 C.F.R. § 2.4 read in part:

> This notice shall be writing and shall be given by the official making the decision or taking the action. Failure to give such notice shall not affect the validity of the action or decision, but the right to appeal therefrom shall continue under the regulation.

> prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

Regulations concerning leases on restricted Indian lands require the Secretary's approval of cooperative agreements:

> All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

25 C.F.R. § 171. 21(b) (now § 211.21(b)).

Although 25 U.S.C. § 396d and 25 C.F.R. § 211.21(b) do not so expressly state, the United States' function as a trustee over Indian lands necessarily limits the Secretary's discretion to approve communitization agreements. Even in the absence of express language about a trust fund, a trust, or a fiduciary connection, when the Government controls tribal monies or properties, a fiduciary relationship normally exists with respect to those monies or properties. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980). The United States Supreme Court has stated that:

> [A] fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).

United States v. Mitchell, 463 U.S. 206, 225 (1983). The Supreme Court noted in *Mitchell* that the existence of a general trust relationship between the United States and the Indian people is undisputed. *Id.* at 225.

Mitchell deals with holding the United States accountable in money damages for alleged breaches of trust in connection with management of forest resources, and the underlying message clearly establishes the existence of a fiduciary relationship when statutes and regulations give the Federal Government a pervasive role in management of Indian properties. *Id.* at 224. There can be no question that 25 U.S.C. § 396d relegates control of oil and gas leases on Indian lands to the Secretary of the Interior. *See Jicarilla Apache Tribe v. Supron Energy*, 728 F.2d 1555, 1563 (10th Cir. 1984), (Seymour, J., concurring in part and dissenting in part), *dissenting opinion adopted as the majority opinion as modified*, 782 F.2d 855 (10th Cir. 1986) (en banc); *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. The Board of Oil and Gas Conservation of the State of montana,* 792 F.2d 782, 794 (9th Cir. 1986); and *Blackfeet Tribe of Indians v. Montana,* 729 F.2d 1192, 1199 & n. 18 (9th Cir. 1984) (en banc), *aff'd*, 471 U.S. 579 (1985). Therefore, the Secretary's discretion to approve or disapprove leases and communitization agreements must be governed by fiduciary standards and limited by fiduciary duties.

Since the Secretary's discretion is limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands and as the supervisor and administrator of oil and gas leases on those lands, the following holds true:

> Acting in the capacity as a trustee, the Secretary and his delegate, the Superintendent of the BIA, must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues.

Kenai, 671 F.2d at 386, citing *Gray v. Johnson*, 395 F.2d 533, 536 (10th Cir. 1968), *cert denied*, 392 U.S. 906 (1968). "If

the Superintendent considered all relevant factors in reaching his decision and has made no clear error of judgment, his action cannot be overturned." *Kenai* at 386, citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). *See also Sabin v. Butz*, 515 F.2d 1061, 1067 (10th Cir. 1975). The issues decided in the district court and now before this Court are if a genuine issue of material fact exists as to whether the Secretary considered all the factors relevant to a fiduciary's decision and whether the Secretary complied with his duty to maximize lease revenues when he approved the communitization agreements.

The district court remanded the case to the Secretary for further explanation of the reasons underlying the approval of the communitization agreements. A review of the record indicates that the Secretary's response to the Order of Remand included economic benefit for the Tribe as one justification for approval of the communitization agreements. The record shows, however, that the Area Director, as the Secretary's delegate, did not consider all the relevant economic factors. The Secretary acknowledged in his response that the Acting Area Director of the Anadarko Office of the BIA "did not consider any evidence of the market value and marketability of the new lease."[10]

Unusual conditions existed in the Anadarko area in the early 1980's. The record establishes that the Area Director reported to the Secretary that deep gas discovery in the Anadarko area had prompted a short period of astronomical bids on advertised mineral tracts. A comparison of lease bonuses obtained by the Tribe on the various tracts located in Sections 29 and 32 shows that for each of the 1976 leases at issue, the Tribe received a bonus of thirty-five dollars per acre and a royalty rate of sixteen and two-thirds percent.[11]

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[10] *See* Attachments to Appellee's Response to Appellant's Opening Brief, Tab 2 at 8.

[11] *See* Attachments to Appellee's Response to Appellant's Opening Brief, Tab 2 at 7.

By contrast, the two 1980 leases to Reading and Bates yielded a bonus to the Tribe of two hundred and thirty-five dollars an acre and a royalty rate of twenty percent on one tract, and a bonus of three hundred and fifteen dollars per acre and a twenty percent royalty rate on the other tract.[12]

The Secretary stated that the bonus paid when Woods acquired the oil and gas leases was compensation for the right to develop the leasehold for a specified term of years, and because the Indian leases were still in their primary terms at the time the communitization agreements were approved, there was no reason to require an evaluation of the market value and marketability of the leases in 1981. According to the Secretary, disapproval of the communitization agreements and failure to communitize the unit would have resulted in losing several leases, and it was unlikely that new leases would have been negotiated. The Secretary explained that, since the losing lessees would probably have resorted to retaliatory litigation, "It was the Area's belief that no lessee would be willing to risk leasing any of the tracts that were involved in litigation or were de-spaced. Thus the Area did not believe that the Tribe would receive any increased revenues from re-leasing."[13] Relying on such a justification would, however, result in across-the-board approvals of communitization agreements. The threat of litigation may be intimidating, but careful analysis of relevant factors takes precedence over avoiding a lawsuit.

The Secretary and his delegates acted inconsistently with fiduciary responsibilities owed to Indian mineral interest owners. In light of the Anadarko Area conditions and the market for oil and gas, the conclusions reached as to the market value and marketability of leases prior to the boom

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[12] *Id.*

[13] *See* Attachments, Appellee's Response to Appellant's Opening Brief, Tab 2 at 10.

period of 1980 and 1981 should have been reconsidered. After reviewing the record, this Court agrees with the district court that the trust responsibilities to the Tribe were uncontrovertedly breached by failure to examine all relevant factors before approving the agreement.

Factors relevant to an agency's decision to approve communitization agreements were discussed by this Court in *Kenai supra*, which involved the Secretary's refusal to approve communitization agreements. In *Kenai* we held that:

> . . . . limiting the Superintendent's considerations solely to matters of conservation and production would be inconsistent with his trust responsibilities to the Indians in leasing tribal lands. In light of these trust responsibilities, the Superintendent must take the Indian's best interests into account when making any decision involving leases on tribal lands, and has broad discretion to consider all factors affecting their interests. The Superintendent has no obligation to approve a plan which does not serve the Indians' best interests and he has acted within his discretion in refusing to approve an economically unsatisfactory plan.

Kenai, 671 F.2d at 387. Appellant Woods claims that the fact that unitized development is indisputably proper sufficiently supports the Secretary's economic judgement to approve communitization. Woods contends that the quintessential component of communitization of leases is whether the proposed plan is reasonable and appropriate for the purpose of proper development and conservation of natural mineral resources. Since the proposed plan was reasonable and appropriate, Woods argues, the Secretary's approval was within his discretion.

Appellant's argument completely ignores the fiduciary relationship between the Secretary and the Tribe. When the Secretary is obligated, as in this case, to act as a fiduciary, "then his actions must not merely meet the minimal

requirements of administrative law, but must also pass scrutiny under more stringent standards demanded of a fiduciary." *Jicarilla*, 728 F.2d at 1563. The Area Director, as a delegate of the Secretary of the Interior, has broad administrative discretion to consider all factors affecting the Tribe's interests, but his fiduciary responsibilities do not allow such discretion when it comes to *not* considering certain factors. The Area Director was not free to conclude, without some consideration of the present market conditions, that new leases would be as difficult to negotiate as they would have been in pre-boom times. Absent consideration of current market developments, the Area Director's conclusion that he could not protect the Tribe's economic interests if the communitization agreements were disapproved was inconsistent with the agency's fiduciary obligations to the Tribe, and seems more consistent with a policy of blanket approval than with a policy of maximizing tribe revenues.[14]

In this instance, the Secretary and his delegates should have considered the economic realities of an oil and gas lease

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[14] Woods claims that the Secretary cannot disapprove communitization agreements for the sole purpose of allowing the underlying leases to lapse so that the Tribe may gain revenues by re-leasing. *See Cotton Petroleum Corp. v. United States Dep't of the Interior*, 870 F.2d 1515, 1527-28 (10th Cir. 1989). Woods' claim is consistent with *Cotton*, in which we refused to defer to the Secretary's decision since he considered only economic factors, rather than all relevant factors. *Id.* at 1527-28. This is not a *Cotton* situation, however: although our holding today has the ultimate effect of denying the communitization agreements, that effect is merely the aftermath of the Secretary's failure to consider the prerequisite relevant economic factors in his decision to approve the agreements. As per *Kenai*, our opinion is that those economic factors were indeed relevant and should have been considered. 671 F.2d at 387. In *Kenai*, we *deferred* to the Secretary's decision because he considered economic, conservation and production factors. *Id.* However, in the case at bar, as in *Cotton*, we cannot defer since the Secretary did not consider all relevant factors.

in the Anadarko region in the early 1980's as compared to 1976. The failure to do so was arbitrary, capricious and an abuse of discretion. This Court finds that the district court correctly applied the substantive law in determining that the Secretary and his delegates breached their fiduciary responsibilities to the Tribe.

IV.

Summary

In conclusion, we find that the Tribe's administrative appeal was timely. We also find that the Secretary and his delegates breached their fiduciary responsibilities to the Tribe by failing to consider the market conditions in the Anadarko Area during the early 1980's. We agree with the district court that such conditions were factors relevant to the agency's decision, and failure to consider them therefore constitutes an arbitrary and capricious abuse of discretion by the Secretary and his delegates. Because the Secretary abused his discretion, the communitization agreements are not valid, and the leases upon which drilling had not commenced as of May 10, 1981 expired on that date. Accordingly, the order of the district court granting summary judgment to the Tribe is **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA,	)	Filed May 26, 1989
Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA, et. al.,	)	
Defendents.	)	

ORDER

This case is before the Court for consideration of a number of motions for summary judgment; (1) the Motion for Partial Summary Judgment on the Tribal Consent and Secretarial Authority Issues, filed by the plaintiff, the Cheyenne-Arapaho Tribes of Oklahoma (the Tribe); (2) the Tribe's Cross-Motion for Partial Summary Judgment on the Issue of Whether the Woods Leases Violate the Indian Mineral Leasing Act of 1938; (3) the Tribe's Cross-Motion for Summary Judgment on the Issue of Whether the Woods Leases Were Amended by the Communitization Agreements to Condition Extension Beyond Their Primary Terms on Production Rather than Drilling; (4) the defendant Woods Petroleum Corporation's (Woods') Motion for Summary Judgment; (5) the Motion for Summary Judgment filed by the defendants the United States of America, the Department of the Interior, William P. Clark, individually and as a Secretary of the Interior; William P. Ragsdale, individually and as Area Director of the Anadarko Office of the Bureau of Indian Affairs; and Tom Dowell, individually and as Superintendent of the Concho Agency of the Bureau

of Indian Affairs (collectively referred to as the federal defendants). Having carefully considered the briefs and oral arguments presented in support of these motions, the Court enters the following findings of fact and conclusions of law.

I. Factual Background

This case concerns the Bureau of Indian Affairs' (BIA's) approval of two communitization agreements concerning oil and gas leases on lands owned by the Tribe in Custer County, Oklahoma. The fundamental issue is whether the BIA's approval of the subject agreements extended the primary terms of certain leases on the Tribe's land.

The record indicates that the plaintiff, a federally recognized Indian tribe organized under a constitution and bylaws approved by the Secretary of the Interior, entered into the following oil and gas leases with the defendant Woods in 1976: (1) lease number 14-20-205-6895, covering the northeast quarter of Section 32-14N-20W in Custer County Oklahoma; (2) lease number 14-20-205-6896, covering the northwest quarter in Section 32-14N-20W in Custer County; (3) lease number 14-20-205-6897, covering the southeast quarter of Section 32-14N-20W in Custer County; (4) lease number 14-205-6894, covering the southwest quarter of Section 29-14N-20W. Each lease was for a primary term of "5 years from and after the approval hereof of the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land." All four leases were approved by the Superintendent of the Concho Office of the BIA on May 10, 1976. Under each of these leases, Woods was the sole lessee and owner of all of the working interest in each lease.

Each of the leases covers 160 acres, all of which is held in trust by the United States for the Tribe. However, as to the surrounding tracts, there are some important differences

between the leases in Section 29 and the leases in Section 32. Specifically, in Section 29, in addition to the 160 acre tract here at issue, there is another 160 acre tract held by the United States in trust for the Tribe. However, the other 320 acres in Section 29 is owned by non-Indians. In contrast, in Section 32, all of the tracts are held by the United States in trust for the Tribe.

In both Sections 29 and 32, measures were taken to unitize the mineral interests involved. On July 17, 1980, the Oklahoma Corporation Commission entered an order establishing 640 acre drilling and spacing units for both sections. Subsequently, in the spring of 1981, the working interest owners in Sections 29 and 32 entered into communitization agreements pooling the mineral interests in each section. Under these agreements, drilling operations in any part of the section would be deemed to occur on each lease within the section. Since each of the 1976 leases contained a drilling clause purporting to extend the lease if drilling was commenced during the 5 year primary term, the effect of the communitization agreements would be to extend the terms of all the leases in Sections 29 and 32 if drilling was commenced on any lease within these sections. Under the agreements, Reading and Bates Petroleum Company (which had acquired leases for the northeast quarter of Section 29 and the southwest quarter of Section 32 in February, 1980) was designated as the operator of the unit wells in both sections.

In both Sections 29 and 32, drilling of unit wells had commenced by May 1981. In Section 29, the drilling of the unit well began on the northeast quarter on November 30, 1980. By May 1981, the unit well had progressed to a depth of 15,073 feet. In Section 32, the unit well was spudded on May 6, 1981 in the northwest quarter, and, by May 8, 1981, drilling had progressed to a depth of 16,084 feet.

Although the working interest owners in Section 29 and

32 entered into communitization agreements covering each section, the Tribe did not consent to these particular agreements. On April 16, 1981, a representative of Reading and Bates Petroleum Company delivered the proposed communitization agreements to the Tribe's business office and requested the Tribe's approval. Subsequently, on April 22 and April 23, 1981, the chairman of the Tribe's business committee and the Tribe's business manager met with the Reading and Bates representative and officials from the Anadarko Area Office of the BIA and explained that they would not agree to the communitization agreements unless the 1976 leases were renegotiated. In subsequent meetings with the Reading and Bates representative, tribal officials demanded a lease bonus of $1500 per acre as well as a ten percent back-in working interest in the leases.

On May 1, 1981, Reading and Bates and the other working interest owners in Section 29 and 32 rejected the Tribe's demand for renegotiation of the leases. In response to the Tribe's demand, Reading and Bates sent a letter to the Tribal treasurer demanding that the Tribe consent to the proposed communitization agreements. The letter stated that in the event that leases were lost, Reading and Bates would "pursue every legal remedy" in order to receive restitution for the losses that it might sustain.

On May 5, 1981, Reading and Bates submitted the proposed communitization agreement to the United States Geological Survey for approval. The USGS recommended approval of both agreements on the following day. On May 8, 1981, the Acting Area Director of the Anadarko Office of the BIA approved both communitization agreements.

On August 5, 1981, the Tribe filed a notice of appeal of the Area Director's decision to approve the communitization agreements. Subsequently, on February 9, 1982 the Deputy Assistant Secretary of the Department of the Interior affirmed the Acting Area Director's decision. The Tribe then

appealed this decision to the Court of Indian Appeals. On February 10, 1983, the Court of Indian Appeals entered an order affirming the Anadarko Area Director's decision. Subsequently, the Court of Indian Appeals granted the Tribe's petition for rehearing and called for supplementation of the record so that the reasons for the Area Director's approval of the agreements could be set forth in more detail. Upon consideration of supplemental materials, on May 18, 1984, the Court of Indian Appeals entered an order reaffirming the Area Director's May 1981 decision to approve the subject agreements.

The Tribe then commenced this action. In its Complaint, the Tribe asserts the following claims, each setting forth a different legal theory in support of its contention that the 1976 leases expired at the end of their primary terms: (1) the Tribe contends that all four of the subject leases terminated at the end of their primary terms because production was not achieved in paying quantities at the end of these terms. According to the Tribe, since the "commence drilling clauses" in the leases (purporting to extend their terms by the commencement of drilling rather than the achievement of production) are not authorized by the Mineral Leasing Act, 25 U.S.C. §396a et. seq. or the regulations implementing it, these clauses are void; (2) the Tribe contends that all four of the subject leases terminated in 1981 because the communitization agreements here at issue amended the leases such that the leases would expire if production was not achieved by the end of their primary terms; (3) the Tribe contends that the three 1976 leases in which drilling did not occur terminated in 1981 because, in approving the subject communitization agreements without performing a sufficient economic analysis of the impact of such approval on the Tribe, the Acting Area Director breached his fiduciary duty to the Tribe; (4) the Tribe contends that the three non-drilling leases terminated in 1981 because the Acting Area Director's approval of the communitization

agreements was not rationally based; and (5) the Tribe contends that the non-drilling leases terminated in 1981 because the Tribe did not consent to the subject communitization agreements. Under all five causes of action, the Tribe requests the Court to issue an order evicting the defendant Woods from the terminated leases. The Tribe also requests that Woods be held liable for trespassing on the subject leases after 1981 and that Woods be required to account for the full market value of the products converted as a result of the trespass.

Subsequently, summary judgment motions were filed by the parties. Upon review of the record, the Court concluded that the administrative record was inadequate to resolve the issues raised. The Court remanded the case to the Secretary of the Interior with instructions to respond to particular questions propounded by the Court. After the filing of the Secretary's response to the Order of Remand, the parties filed this second round of summary judgment motions.

II. Timeliness of Administrative Appeal

Woods contends that none of the issues raised by the Tribe are properly before the Court because the Tribe's administrative appeal of the approval of the subject communitization agreements was not timely. In support of this argument, Woods notes that although members of the Tribe's business committee were informed of the agreements' approval on May 9, 1981, the Tribe did not file a notice of its administrative appeal until August 5, 1981. Woods invokes 25 C.F.R. §2.10(a), which provides, in part, that notices of appeal of BIA decisions "must be received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the appellant . . . " According to Woods, since 25 C.F.R. §2.10(b) provides that untimely notices of appeal will not

be considered, the Tribe's administrative appeal should not have been decided on the merits, and its arguments should not now be considered by this Court.

The Court finds Woods' argument unpersuasive. As the Tribe has noted, 25 C.F.R. §2.4 provides that notices of administrative action by the BIA "shall be in writing and shall be given by the offical making the decision or taking the action." Here, it is uncontroverted that prior to the filing of the Tribe's appeal, no written notice was provided to the Tribe as to the basis for the approval of the communitization agreements. Therefore, the Tribe's filing of its appeal on August 5, 1981 was not untimely under 25 C.F.R. §2.10. Moreover, Woods has failed to demonstrate that it has prejudiced by the delay in the filing of the Tribe's appeal. The Court thus concludes that the Tribe's administrative appeal was timely and that the issues raised by the Tribe are properly before it.

III. **Tribal Consent**

The Tribe argues that because it did not consent to the subject communitization agreements, these agreements do not operate to extend the primary terms of the non-drilling 1976 leases. Both Woods and the federal defendants responded that by virtue of a particular clause of the leases themselves, the Tribe consented to communitization such that the agreements extended the leases' primary terms.

Consideration of this issue must begin with the Mineral Leasing Act, 25 U.S.C. §396 et. seq., (the MLA), which governs the leasing of mineral interests on Indian lands. Section 1 of the MLA, 25 U.S.C. §396a, provides that, after May 11, 1938, unallotted lands within Indian reservations and lands owned by tribes may, with the approval of the Secretary of the Interior, be leased for mining purposes "by authority of the tribal council or other authorized spokesmen for such Indians for terms not to exceed 10 years

and as long thereafter as minerals are produced in paying quantities."

The MLA also contains a provision concerning agreements for the cooperative or unit development of oil and gas leases on tribal lands. 25 U.S.C. §396d states, in part:

> In the discretion of [the Secretary of the Interior] . . . any lease for oil and gas issued under the provisions of §396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit, or any other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil and gas from land covered by such lease.

Regulations promulgated pursuant to this provision are specifically directed to communitization agreements such as the ones at bar. 25 C.F.R. 211.21(b) (formerly C.F.R. §171.21(b) states:

> All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but *no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.* [emphasis added]

The Tribe's contention is that the underlined [Italicized] language of this regulation provides that a particular communitized agreement cannot be effective until consent is given by the Tribe to that very agreement. The defendants counter that such consent is expressly granted in Clause 9 of the 1976 leases, which states:

> The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area affecting the lease lands, or any pool thereof, if and when collectively adopted by a majority

operating interest therein and approved by the Secretary of the Interior during the period of supervision.

According to the defendants, the Tribe's agreement to subscribe to "any agreement for the cooperative or unit development of the field or area" constitutes the tribal consent to communitization required by 25 C.F.R. 211.21(b).

The parties' contentions thus raise two issues regarding tribal consent: (1) Did the Tribe's execution of leases containing Clause 9 constitute blanket consent to future communitization agreements? and (2) If Clause 9 did constitute such blanket consent, does the blanket consent embodied by the clause satisfy the consent requirement of 25 C.F.R. 211.21(b)?

A. Order of Remand

Upon consideration of the initial summary judgment motions, the Court found the record insufficient to resolve either issue. As to the first issue, the court found Clause 9 susceptible to two reasonable interpretations. On the one hand, the Court concluded, Clause 9 might mean that the parties to the lease agree to abide by any communitization agreement if and when such an agreement is entered into by the majority of the interest owners in the subject sections and is then approved by the Secretary. Under this interpretation, Clause 9 would constitute the Tribe's blanket consent to future communitization agreements. Alternatively, the Court found, Clause 9 might mean that the parties to the lease would first have to agree to a particular communitization agreement themselves. Under this second interpretation, the parties to the lease would then subscribe to and adopt this agreement if and when the agreement that they had reached was adopted by a majority of the working interest owners and approved by the Secretary. Under this interpretation, Clause 9 would not constitute blanket consent to communitization and would require that the parties to the lease specifically agree to a particular communitization agreement

before that agreement could become effective. The Court found the record insufficient to determine which interpretation was adopted by the Anadarko office of the BIA and by the parties of the leases.

As to the proper interpretation of the consent requirement of 25 C.F.R. 211.21(b), the Court found the record similarly inconclusive. In their initial summary judgment motions, the parties identified no case law or administrative guidelines construing the regulation. In addition, the evidence presented as to the manner in which the regulation had actually been interpreted by the BIA and the parties to the 1976 leases was sparse.

In light of the insufficiency of the record as to the meaning of both Clause 9 and 25 C.F.R. 211.21(b), the Court determined that the case should be remanded to the Secretary, so that the following questions could be addressed: (1) what was the Secretary's construction of Clause 9 of the leases at the time they were executed? (2) Were there any written opinions or guidelines as to the construction of Clause 9, and if so, what did they say? (3) What was the Secretary's interpretation of 25 C.F.R. §211.21(b) at the time the leases were executed? (4) Were there any written guidelines or policies regarding the Department's interpretation of 25 C.F.R. §211.21(b)? (5) What was the Secretary's policy with regard to obtaining tribal consent? and (6) Was there any evidence of the parties' construction of Clause 9 and 25 C.F.R. 211.21(b) at the time the leases were executed?

In his response to the Court's Order of Remand, the Secretary explains that the Court's questions were referred to a number of Area Directors in various BIA offices. As to the BIA's construction of Clause 9, the Secretary reports that different responses were received from the different Area Directors. Four Area Directors responded that regardless of whether a lease contained a provision such as Clause 9, tribal consent was always obtained prior to the approval of com-

munitization agreements. Two other Area Directors, including the Anadarko Area Director responded that "their interpretation of Clause 9 was such that by signing the lease containing the language of Clause 9, the Tribe or allotee had already consented to communitization."

The Secretary further reports that the Anadarko Area Director stated that prior to May 1981, it was an office policy to obtain a lessor's consent to a particular communitization agreement "as a means of keeping mineral owners cognizant of development and of the inclusion of their interest(s) in a unit." However, the Secretary also notes that the Anadarko Area Office reported that, until recently, tribal involvement in mineral leasing had been minimal and therefore "interpretation of the consistency of Section 9 in the lease form and of 25 C.F.R. §211.21(b) had not been a problem."

The Secretary adds that he is unaware of any evidence as to the manner in which Clause 9 was actually interpreted by the parties to the leases here at issue. However, he reports that in April, 1982, the Deputy Assistant Secretary for Indian Affairs issued a memorandum stating that a lessor's consent to a particular communitization agreement was not required if that lessor has previously executed a lease containing "terms such as Clause 9 or similar language."

With regard to the interpretation of 25 C.F.R. 211.21(b), the Secretary's response to the Order of Remand provides little additional information. In particular, the Secretary states that "no written guidelines or policies have been issued pertaining specifically to the Department's interpretation of 25 C.F.R. 211.21(b)." The Secretary adds that he has been unable to locate any evidence as to the manner in which the parties to the leases construed 25 C.F.R. 211.21(b)'s requirement of tribal consent.

Upon consideration of the Secretary's response, the Court finds it inconclusive as to the proper construction of Clause 9 and 25 C.F.R. 211.21(b). It is certainly true that

several aspects of the response support the Tribe's contentions. (For example, the fact that, before April, 1982, the Anadarko Office of the BIA required tribal consent to be obtained before communitization agreements were approved suggests that, at least to some BIA officials, Clause 9 did not constitute blanket consent to future communitization agreements). However, other aspects of the Secretary response support the defendants' contentions. (For example, the statements of the Anadarko office of the BIA that its interpretation is that Clause 9 constitutes blanket consent and that its pre-1982 policy obtaining consent was adopted in order to keep Indian mineral interest owners informed of developments affecting their lands are consistent with the blanket consent interpretation of Clause 9).

In light of the inconclusiveness of the Secretary's response, the Court returns to the language of Clause 9 itself in order to resolve the issue of tribal consent. The Court will consider not only the terms of the clause but the law on pertaining to oil and gas leases generally as well as the provisions of the MLA and the policies and underlying it. Both general principles of oil and gas law and the provisions of the MLA will also be considered in interpreting the requirements of tribal consent under 25 C.F.R. 211.21(b).

B. Language of Clause 9

As to the language of Clause 9, although the Court has previously concluded that there are two reasonable interpretations, the Court now finds the one advanced by the defendants to be more convincing. Most importantly, if the Tribe's interpretation of Clause 9 is followed, then the term "any agreement" in Clause 9 refers to an agreement for cooperative development between the two parties to the lease. This interpretation is problematic for several reasons. First, it is belied by the nature of cooperative agreements. Such agreements are generally reached by working interest owners in tracts throughout the proposed unit rather than by the lessor and lessee of a particular tract. Moreover, if one

follows the Tribe's interpretation, then the parties to the lease are, by virtue of Clause 9, agreeing that when a majority of working interest owners enter into a unit agreement then they (the parties to the lease) will then agree to the unit agreement. Under this interpretation, the first purported agreement (between the parties to the lease) has little practical significance, for without any of the other leases in the unit being involved, there can be no unit agreement.

In contrast, the interpretation of Clause 9 advanced by the defendants avoids these problems. If Clause 9 constitutes blanket consent to future communitization agreements, then the reference to "any agreement for cooperative or unit development" describes what those terms usually refer to: an agreement among mineral interest owners in several different tracts. Moreover, under the defendants' interpretation, Clause 9 does not refer to a nebulous, nonbinding agreement to agree to communitization between two parties who are incapable of putting such an agreement into effect by themselves. Instead, the Clause embodies a binding agreement throughout the life of the lease.

Moreover, the defendants' interpretation is supported by a number of cases that have interpreted similar clauses in oil and gas leases. In fact, clauses providing for unitization or pooling are frequently included in such leases and have often been upheld over challenges by lessors. *See, e.g., Gorenflo v. Texaco.,* 566 F.Supp. 722 (M.D. La. 1983); *Heath v. Fellows,* 526 F.Supp. 723 (W.D. Okla. 1981); *Tiller v. Fields*, 301 S.W.2d 185 (Texas Civ. App. 1957); *see generally* 4 Williams, *Oil & Gas Law* §670.1-670.2 at 80-99 (1988); 4 Kuntz, *Law of Oil & Gas* §48.3 at 217-220 (1967).

In fact, in *Phillips Petroleum Company v. Peterson*, 218 F.2d 926 (10th Cir. 1954), the Tenth Circuit expressly held that a unitization clause similar to Clause 9 constituted consent to future unitization. In *Phillips,* a group of lessors entered into various leases containing provisions that granted the lessee, Phillips Petroleum Company, "the right to unitize,

pool, or combine all or any part of the above described lands." Some five years later, near the expiration of the primary terms of the leases, a number of lessors refused to consent to the proposed unitization agreement. Phillips then brought a declaratory judgment action in which it sought a determination that the unitization clause required the lessors to enter into the particular agreement at issue. The trial court found that the proposed agreement did not bind the lessors and that, as a result, the leases expired at the end of their primary terms. Among other conclusions, the trial court found that the unitization clauses in the leases were unenforceable because of vagueness and uncertainty. 218 F.2d at 930.

On appeal, the Tenth Circuit reversed, expressly rejecting the trial court's finding as to the vagueness and indefiniteness of the unitization clause. The Tenth Circuit noted that because of governmentally imposed spacing requirements, lease clauses authorizing unitization had become a practical necessity in the oil and gas industry. 218 F.2d at 931. The court also found the clause's generality warranted by industry practice, explaining:

> Anticipatory provisions in leases for the commitment by the lessee of such leases to the unitization, of necessity must be in general terms. Neither the lessor or the lessee has any way of knowing at the time the lease is taken the facts with respect to which it will be necessary for the lessee to apply his power. It is not practicable for the lessee to await the ascertainment of such facts. He knows from experience that because of the possibility of many changes in ownership of the lessor's interest as time goes on, it may be difficult to effect an agreement for unitization after the lease is taken, if the right to unitize is not included in the lease itself.

218 F.2d at 933. The court found that the relationship between the lessors and the lessee was analogous to that of principal and agent. It concluded that the unitization clauses

were sufficient to grant the lessee the authority, as the lessors' agent, to enter into future unitization agreements. *Id.* at 933. The Tenth Circuit has recently reaffirmed the holding of *Phillips. See Amoco Production Co. v. Jacobs,* 746 F.2d 1394, 1405-1406 (10th Cir. 1984).

In the instant case, the same considerations discussed in *Phillips* indicate that the parties' execution of leases containing Clause 9 constituted consent to future communitization agreements. As the Secretary has explained in his response to the Order of Remand, communitization has been an established practice on Indian lands for some time and, as a result, leases involving lands within the Anadarko region of the BIA have contained unitization clauses such as Clause 9 for fifty years. Clause 9's use of the term "*any* agreement" for cooperative or unit development suggests that the lessees here, like the lessees in *Phillips*, were given broad powers to act as the lessors' agent by entering into future communitization agreements such as the ones here at issue.[1]

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[1] This conclusion finds additional support in the Tenth Circuit's recent opinion in *Cotton Petroleum Corp. v. United States Department of the Interior*, 870 F.2d 1515 (10th Cir. 1989). In *Cotton*, the Court considered the Assisant Secretary of the Department of the Interior's reversal of a BIA Area Director's approval of a communitization agreement covering restricted Indian land. The Assistant Secretary had concluded that disapproval of the communitization agreement was in the best interests of the Indian lessors because, through disapproval, the effected lease would expire such that the lessors could obtain a bonus upon renegotiation. The Tenth Circuit concluded that the Assistant Secretary's narrow concern with the bonus to be obtained from renegotiation constituted a failure to consider all the relevant factors concerning the communitization agreement. As a result, it reversed the district court's affirmance of the Assistant Secretary's decision.

Although the tribal consent issue was not expressly discussed by the Tenth Circuit in *Cotton*, it is noteworthy that the subject lease contained a unitization clause identical to Clause 9 of the leases here at issue. The Tenth Circuit characterized the subject clause as "the parties' express promise to abide by any communitization agreement adopted for the unit and approved by the Secretary." *Id.* at 1528. This characterization supports the blanket consent interpretation of Clause 9.

C. Conflict Between Blanket Consent and the MLA

Throughout its summary judgment briefs, the Tribe has argued that although the blanket consent interpretation finds some support in the language of Clause 9, it is inconsistent with particular provisions of the MLA and with the general policies underlying it. In particular, the Tribe invokes 25 C.F.R. 211.21(b), 25 U.S.C. 396a, and the policies of maximizing tribal revenues and increasing tribal control over mineral leasing matters. The Court finds none of these arguments persuasive.

The Tribe's argument regarding the purported conflict between the blanket consent interpretation and 25 C.F.R. 211.21(b) is based on the assumption that the consent requirement of the regulation refers to particularlized consent to each communitization agreement adopted. As noted above, the regulation does not expressly require such particularized consent, and the Tribe identified no case law or administrative regulations adopting this particularized definition. Moreover, the Tenth Circuit's determination in *Phillips* that a unitization clause in a lease constituted consent to a subsequent communitization agreement indicates that consent to a particular agreement does not inhere in the concept of consent to communitization. Accordingly, the Court finds that the blanket consent interpretation of Clause 9 does not conflict with 25 C.F.R. 211.21(b).

With regard to 25 U.S.C. §396a, the Tribe's contention is that the right to approve mineral leases there conferred on Indian tribes includes the right to approve modifications of leases. Since the subject communitization agreements modify the 1976 leases by extending their primary terms, the Tribe reasons, §396a confers upon the Tribe the right to approve any particular communitization agreement before it becomes effective.

What the Tribe ignores is that, in the instant case, the authorization for the communitization agreement is set forth

in the very leases that, pursuant to §396a, the Tribe approved in 1976. To say that the Tribe must consent to a particular modification by means of a communitization agreement when, in the very leases in question, the Tribe has already consented to such modification, would be to ignore the plain language of those leases. This is not required by the MLA.

As to general policies, the Tribe is certainly correct in arguing that the MLA was enacted to maximize tribal revenues as well as to increase the Indians' control over leasing matters and to provide for greater uniformity in leasing practices. *See Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555 (10th Cir. 1984), dissenting opinion adopted as the majority opinion, 782 F.2d 855, *cert. den.*, 479 U.S. 970 (1986). However, the Court does not find the blanket consent interpretation of Clause 9 to be inconsistent with these policies.

As to the maximization of lease revenues, the Tribe's blanket consent does not place it at the mercy of its lessees who may then take any action regarding communitization that they wish, even if such actions are detrimental to the economic interests of the Tribe. Instead, as the defendants have noted, even if Clause 9 constitutes the Tribe's blanket consent to communitization, any particular communitization agreement must still be approved by the Secretary of the Interior or one of his delegates. In determining whether to approve a particular communitization agreement, the Secretary and his delegates must act as fiduciaries to the Indian mineral interest owners. They must determine what is in the Indians' best interest and must seek to maximize the Indians' lease revenues. *See Kenai Oil & Gas, Inc. v. Department of the Interior*, 671 F.2d 383 (10th Cir. 1982). Clause 9's blanket consent does not forfeit the Indians' right to the Secretary's protection.

As to the policy of increasing the Indians's control over mineral leasing, it is undoubtedly true that if Clause 9 did

not constitute blanket consent, the Tribe would have more control over the disposition of its mineral leases. However, for several reasons, the Court finds that the blanket consent interpretation of Clause 9 is not so inconsistent with this policy that it should not be adopted. In the first place, as noted above, increasing such control is only one of the policies underlying the MLA. The Court has found no authority for the proposition that this goal should override the many other considerations applicable to this issue. Moreover, blanket consent to communitization by means of a lease clause does not constitute a relinquishment of all control over leasing matters. In particular, an Indian mineral owner remains free to refuse to sign leases containing communitization clauses or seek to have the language of those clauses modified before signing them. In addition, after signing a lease containing a communitization clause, an Indian lessor may object to communitization by urging the Secretary not to approve the proposed communtization agreement because it is not in his or her best interest. Indeed, the Tribe took such action here. Accordingly, the Court finds no fundamental conflict between the blanket consent interpretation of Clause 9 and the policies underlying the MLA.

D. Interpretation of Clause 9 by the BIA and the Parties to the 1976 Leases

The Tribe also contends that the blanket consent interpretation of Clause 9 is controverted by the manner in which the clause was actually interpreted by both the BIA and by the parties to the subject leases. As to the BIA, the Tribe relies primarily on the Secretary's statement (in the response to the Order of Remand) that, prior to 1981, the policy of the Anadarko Area Office of the BIA was to obtain the consent of tribal lessors to communitization agreements before such agreements were approved. As further evidence of this policy, the Tribe refers to certain guidelines for the Anadarko Area office, dated September 28, 1971, which state:

> All agreements for the unit operation of prospective oil and gas areas are to be submitted for approval by the Area Director upon recommendation of the Superintendent. The Bureau considers these agreements to be modifications of the oil and gas leases involved and has always required that such agreements be submitted to competent adult lessors for signature.
>
> If an adult lessor refuses to sign the agreement and the Area Director is of the firm opinion that it should be approved, he may approve the agreement acting under his delegated authority and the provisions of 25 C.F.R. 172.24(c). However with respect to tribal lands; ratification by the tribe is necessary before committing their lands to a unit agreement, in accordance with 25 C.F.R. 171.21(b).

Finally, the Tribe notes that the Assistant Secretary's opinions of June and August 1981 (which conclude that Clause 9 constitutes blanket consent) indicate that, prior to that time, a contrary understanding prevailed as to the meaning of Clause 9.

Upon careful review of all these materials, the Court concludes that at the time the 1976 leases were entered into, there was not a predominate interpretation of Clause 9 and 25 C.F.R. §211.21(b) requiring consent to particular communitization agreements. Specifically, since Clause 9 expressly requires the lessor to subscribe to and abide by communitization agreements, the Anadarko Area Office's policy of requiring the signature of Indian tribal lessors on communitization agreements is entirely consistent with interpretation of Clause 9 as blanket consent. Even with such blanket consent having been given, it would be entirely reasonable for the Anadarko Office to require lessors to subscribe to the agreements. Moreover, although the Secretary's response to the Order of Remand acknowledges that, prior to 1981, such signatures were required by the

Anadarko Office of the BIA, it in no way states that without such signatures a communitization agreement could not be effective. Instead, the Secretary's response indicates that the Anadarko Area BIA always interpreted Clause 9 as blanket consent and had not had the occasion to consider this particular issue until the dispute in the instant case arose in 1981.

For several reasons, the Anadarko Office's guidelines do not alter this conclusion. First, as the federal defendants have noted, such internal guidelines are not binding on the agency and do not have the force and effect of law. *See Schweiker v. Hansen*, 450 U.S. 785, 789-90, *reh'g den.*, 451 U.S. 1032 (1981); *First State Bank of Hudson County v. United States*, 599 F2d 558 (3d Cir. 1979), *cert. den.*, 444 U.S. 1013 (1980). In addition, as the defendant Woods argues, the guidelines simply do not address the issue of whether a communitization agreement may be effective in the absence of a lessor's signature and tribal ratification if the subject lease contains a provision such as Clause 9.

With regard to the manner in which the parties to the lease actually interpreted Clause 9, the Tribe's contention is that the attempt of Woods and other working interest owners to obtain the tribal consent of the subject communitization agreements in April, 1981 combined with the refusal of the Tribe's representatives to give this consent indicates that the parties to the 1976 leases believed that, in spite of Clause 9, the Tribe's consent to the particular communitization agreements was required. For several reasons, the Court does not agree.

Most importantly, as noted above, even under the blanket consent interpretation of Clause 9, the parties to the 1976 leases still agreed to *subscribe* to communitization agreements if and when those agreements were adopted by a majority of the working interest and approved by the Secretary. Thus, the attempt of the Reading and Bates representatives to obtain the signatures of tribal represen-

tatives may be reasonably interpreted as an attempt to obtain the necessary subscriptions, blanket consent having already been obtained by means of the leases. Similarly, the refusal of tribal representatives to subscribe to the subject agreements may be interpreted in conjunction with their contentions that the agreements were not in their best interests such that the Secretary should not approve them. Expressing objections to particular communitization agreements is not inconsistent with the blanket consent interpretation of Clause 9, for even under this interpretation, Secretarial approval is still required. Accordingly, the Court finds that the record does not establish that the parties to the 1976 leases intended Clause 9 to require particularized tribal consent to each communitization agreement. In the absence of conclusive evidence as to the parties' intent, the more convincing construction of Clause 9 should control.

E. Publication and Retroactive Effect of Blanket Consent Interpretation of Clause 9

The Tribe also argues that even if the Court finds the blanket consent interpretation consistent with the MLA and the understanding of the parties to the 1976 leases, this interpretation should not be applied in the instant case because of the manner in which the interpretation was adopted by the BIA. According to the Tribe, the blanket consent interpretation was not expressly adopted by the BIA until June, 1981, when the Acting Deputy Assistant Secretary of the Department of the Interior sent a memorandum to the Anadarko Area Director stating that Clause 9 constituted the requisite consent to communitization. The Tribe contends that the promulgation of this interpretation by means of the June, 1981 memorandum renders the interpretation inapplicable to the 1976 leases for two reasons (1) because the blanket consent interpretation constitutes a legislative rule that, under 5 U.S.C. §552(a)(1)(D) and §553, cannot be enforced unless it is published; (2) because the blanket

consent interpretation constitutes a new interpretation of 25 U.S.C. §396d that should not be applied retroactively.

The Court finds neither argument persuasive. As to the first argument, the fact that the June, 1981 memorandum was not published would be material only if the blanket consent interpretation there set forth constituted an amendment to the applicable regulation, 25 C.F.R. 211.21(b). However, as noted above, the blanket consent interpretation is supported by the language of Clause 9 and by established case law. Contrary to the Tribe's suggestions, the June, 1981 memorandum did not set forth a new interpretation of Clause 9 and 25 C.F.R. 211.21(b). For the same reason, interpreting Clause 9 as blanket consent does not constitute retroactive application of a statutory amendment or a new regulation. The law as it stood in 1976 supports the blanket consent intepretation of Clause 9.[2]

F. Conclusion

In conclusion, it should be noted that some deference should be afforded to administrative interpretations of statutes and regulations, particularly in complex and

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[2] On October 21, 1987, the Department of the Interior published a proposed rule pertaining to communitization agreements on Indian lands. Designated 25 C.F.R. §225.55, the proposed rule, states in part that:

> Where individual or tribal Indian owners have consented in an oil and gas or geothermal contract to include their lands in a cooperative or other development plan, further consent of such owners shall not be required to obtain the approval of a proposed agreement by the Secretary.,

52 Fed. Reg. 39, 360 (October 21, 1987).

For the reasons set forth above, the Court finds the promulgation of this proposed rule does not establish that, prior to its adoption, particularized consent to communitization is required. Even in the absence of the proposed rule, there is ample authority to support the blanket consent interpretation of Clause 9.

specialized areas. *See Office of Communication of United Church of Christ v. Federal Communications Commission*, 707 F.2d 1413, 1422 (D.C. Cir. 1983); *Columbia Gas Transmission Corp. v. Federal Power Commission*, 530 F.2d 1056, 1059 (D.C. Cir. 1976). Here as noted above, there have already been several administrative determinations that Clause 9 constitutes blanket consent: the opinion of the Assistant Secretary set forth in the June, 1981 memorandum as well as the two decisions of the Court of Indian Appeals in the instant case. For the reasons set forth above, the Tribe has offered no compelling reasons why these interpretations of Clause 9 are incorrect, and the Court finds persuasive the reasoning and conclusions reached at the administrative level. Accordingly, the Court concludes that Clause 9 of the subject leases constituted the Tribe's consent to communitization required by 25 C.F.R. §211.21(b). Therefore, the subject communitization agreements are not invalid because the Tribe did not consent to them.

IV. Secretarial Authority

The Tribe next argues that, in approving the subject communitization agreements, the Area Director exceeded the scope of his lawful authority because he failed to consider all the factors relevant to the approval of the agreements. In particular, the Tribe contends that the Area Director failed to properly consider the impact of approval of the agreements on the Tribe's economic interests. As a result, the Tribe contends, the Area Director's approval of the subject agreements is void, and the non-drilling 1976 leases expired at the end of their primary terms.

In general, as noted above, under 25 U.S.C. §396d, the approval of communitization agreements involving mineral interests in tribal lands is committed to the discretion of the Secretary of the Interior and his delegates. In reviewing actions committed to agency discretion, the Court's func-

tion is to determine whether the subject decision was arbitrary, capricious, an abuse of discretion, or otheriwse not in accordance with law. 5 U.S.C. §706(2)(A), *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Kenai*, 671 F.2d at 386. If the record indicates that the administrative decision maker considered all the relevant factors and made no clear error in judgment, the administrative decision should be affirmed. *Overton Park*, 401 U.S. at 416-417; *Kenai*, 671 F.2d at 386.

Review of decisions involving the approval or disapproval of communitization agreements has been discussed by the Tenth Circuit in *Kenai, supra.* There, the Tenth Circuit held that the Secretary's discretion in approving communitization agreements is limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands and as the supervisor and administrator of oil and gas leases on those lands. The Tenth Circuit further stated:

> Acting in the capacity as a trustee, the Secretary and his delegate, the Superintendent of the BIA, must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues. [citations ommitted]

671 F.2d at 386. Thus, in the instant case, general principles regarding review of agency decisions must be applied in light of the Secretary of Interior's fiduciary responsibilities to the Indians. As to the approval of the subject communitization agreements, the issue before the Court is whether the Secretary and his delegates considered all the factors relevant to a fiduciary's decision and, in particular, whether the Secretary acted in a manner consistent with his obligation to maximize tribal lease revenues.

The reasons for the Area Director's approval of the subject communitization agreements are set forth in two

memoranda written by BIA officials in response to the Board of Indian Appeals' request for supplementation of the record and in the United States' response to this Court's Order of Remand. Essentially the two memoranda submitted to the Board of Indian Appeals state that the Area Director approved the communitization agreements because communitization in general was determined to be in the best economic interest of the Tribe. The memoranda explain that if the communitization agreements were not approved and the 1976 leases allowed to expire, the lessees would have challenged this action in the courts, rendering new leases unmarketable. The memoranda add that a refusal to approve the communitization agreements would involve a risk that the Oklahoma Corporation Commission would de-space the subject tracts from the applicable drilling and spacing units established by the Commission, thus decreasing the net revenues to the Tribe. The memoranda add that communitization in Sections 29 and 32 was geologically justified and would result in a course of long term development that would be the most favorable for all the parties concerned.

The reasoning underlying the two explanatory memoranda has been discussed by this Court in detail in its Order of Remand. Essentially, the Court there concluded that although disapproval of the communitization agreements might have led to extensive litigation by the losing lessees and to the Corporation Commission's de-spacing of the subject tracts, it was impossible to determine the impact of these events on the economic interests of the Tribe without first knowing the market value and marketability of the new leases that could have been negotiated had the communitization agreements been allowed to expire. In addition, the Court noted that the explanatory memoranda failed to distinguish a disapproval of the subject communitization agreements from a refusal to ever communitize the subject tracts and that the memoranda also failed to consider the Secretary's power to impose restrictions on drilling and pro-

duction on tribal lands. Finally, the Court noted that the memoranda's discussion of de-spacing did not seem to take into account the fact that the unit wells on both Sections 29 and 32 were located on tribal tracts.

In light of these omissions, the Court remanded the case to the Secretary for further explanation of the reasons underlying the approval of the communitization agreements. In the Order of Remand, the Court directed the Secretary to respond to particular questions propounded by the Court.

In its response to the Court's Order of Remand, the Secretary first acknowledges that, in May 1981, the Acting Area Director of the Anadarko Office of the BIA "did not consider any evidence of the market value and marketability of the new leases." The Secretary explains that because of Clause 9 of the subject leases (discussed above), "there was no reason for requiring another evaluation during the primary term of the lease." As to the basis for the Area Director's conclusion that revenue lost from de-spacing in litigation would exceed any revenue generated from the negotiation of new leases, the Secretary responds that since litigation by the losing lessees would have been likely, "It was the Area's belief that no lessee would be willing to risk leasing any of the tracts that were involved in litigation or were de-spaced. Thus the Area did not believe that the Tribe would receive any increased revenues from re-leasing."

Throughout the response to the Order of Remand, the Secretary stresses that by means of approval of the subject communitization agreements, the Area Director insured that, if oil and gas were discovered in Sections 29 and 32, the Tribe would receive an ongoing income. On the other hand, the Secretary maintains, it was the Area Director's opinion that disapproval would entail "the potential prospect of nondevelopment, a gamble of nonparticipation, several years of litigation and/or a combination of all." Furthermore, according to the Secretary, the Area Director noted before

approving the communitization agreements that there was evidence that the 1976 leases were being diligently developed, and this too supported his decision. The Secretary's response further states that the Area Director was concerned that if the communitization agreements were disapproved, the lessees might choose not to develop the particular tracts on which the unit wells were located.

In conclusion, the Secretary stresses that if the communitiztion agreements were disapproved, the response of the losing lessees could simply not be predicted with certainty. Thus, the Secretary states, in May 1981, the Acting Area Director could not have conclusively determined whether approval or disapproval would have been more beneficial to the Tribe. According to the Secretary, the Area Director's approval was based on past experience, and the Area Director made his best judgment as to what would be in the best interests of the Tribe. The Secretary concludes, "Through many years experience in the complexities of leasing, the Department has learned that few if any, potential lessees will make a commitment involving a tract claimed by another lessee."

Upon review of the Secretary's response to the Order of Remand, as well as the explanatory memoranda filed during the administrative appeal of this case, it is evident that a justification for approval of the subject communitization agreements can be set forth in terms of the economic benefit of such approval to the Tribe. Nevertheless, the fact that such a justification may and has been set forth does not necessarily mean that the Area Director here considered all the relevant factors and discharged his fiduciary responsibilities.

In particular, it is noteworthy that the primary justification set forth in response to the Order of Remand, (i.e. that if the subject communitization agreements had been disapproved, new leases could not have been negotiated) is based on an analysis that would be true in every case involving

communitization agreements that operate to extend oil and gas leases. The Secretary's position appears to be that potential lessees are so wary of the claims of former lessees that the disapproval of a communitization agreement and a resulting expiration of applicable leases would necessarily mean that new leases could never be negotiated. The Secretary seems to suggest that this would be so regardless of market conditions, the discovery of mineral reserves, or any other factors relating to the recovery of oil and gas. As the Secretary would have it, communitization agreements will always be in the best interests of the Tribe, and a blanket policy of approving them is appropriate.

Yet, elsewhere in the response to the Order of Remand, the Secretary acknowledges that conditions in the Anadarko area in the early 1980s, were somewhat unusual for, as the Area Director reported, "deep gas discovery prompted a shor period of astronomical bids on our advertised mineral tracts." A comparison of the lease bonuses obtained by the Tribe on the various tracts located in Section 29 and Section 32 illustrates this point. For each of the 1976 leases here at issue, the Tribe received a bonus of thirty-five dollars per acre and a royalty rate of sixteen and two-thirds percent. In contrast, for the lease of the southwest quarter of Section 32 in February 1980 to Reading and Bates, the Tribe received a bonus of two hundred and thirty-five dollars an acre and a royalty rate of twenty percent. For the lease of the northeast quarter of Section 29, also negotiated in February 1980, the Tribe received a bonus of three hundred and fifteen dollars per acre and a royalty rate of twenty percent.

In light of such developments in the market for oil and gas, it stands to reason that conclusions reached as to the market value and marketability of leases prior to the boom period might have to be reconsidered for 1980 and 1981. Nevertheless, in concluding that no new leases could be negotiated on the subject tracts, the Area Director seems

to have referred to pre-boom conditions. Indeed, the Secretary's first statement in his response to the Order of Remand directly acknowledges this, for he states that once the leases were signed in 1976, there was no reason to require an evaluation of the market value and marketability of the leases in 1981.

The Court finds such reasoning inconsistent with the fiduciary responsibility owed to Indian mineral interest owners by the Secretary and his delegates. A trustee charged with responsibility for trust property is not free to underestimate the value of such property when such under evaluation will damage the interest of his beneficiary. The situation is analogous to that of a trustee charged with the responsibility to sell trust property. If the trustee underestimates the value of that property there is a substantial risk that he will not obtain the best possible price for it. *See, e.g., Terry v. Midwest Refining Co.*, 64 F.2d 428 (10th Cir.); *cert. den.*, 290 U.S. 660 (1933); *Allard v. Pacific National Bank*, 663 P.2d 104, 111 (Wash. 1983). Here, in light of the favorable market conditions existing in May of 1981, the Area Director was not free to conclude, without some consideration of the present market conditions, the new leases would be as difficult to market as they would have been at other times.

The other explanations offered in support of the Area Director's approval of the communitization agreements also indicate that the particular conditions existing in Sections 29 and 32 in May of 1981 were not taken into account. In particular, as noted in the Court's Order of Remand, the discussion of de-spacing concludes that the de-spacing of the subject tracts, in itself would decrease the Tribe's net revenues. This analysis seems to assume that unit wells are located on tracts owned by parties other than the Tribe. However, as noted above, in both Sections 29 and 32, the

unit wells are located on tribal tracts (the northeast quarter and the northwest quarter, respectively). Thus, the absence of a communitization agreement, standing alone, would increase the Tribe's net revenues, since the production from the unit wells would not be allocated among other tracts not owned by the Tribe.

Of course, it may be, as the Secretary suggests in his response to the Order of Remand, that the disapproval of the subject communitization agreements would have resulted in the refusal of the lessees to further develop the leases on which the unit wells were located. However, a thorough assessment of the probability of such a result would require consideration of the particular unit wells at issue. Here, in Section 29, drilling of the unit well began in the northeast quarter in November of 1980. In May of 1981 drilling of the well had progressed to a depth of fifteen thousand and seventy-three feet. In Section 32, drilling of the unit well began in April of 1981 and by May 8, 1981 such drilling had progressed to a depth of sixteen hundred and thirty-four feet. Certainly, the progress and the prospects of these unit wells would be relevant to a determination of how likely it would be that the lessees would cease development of these wells if other leases in Section 29 and 32 were terminated by disapproval of the subject communitization agreements. However, in considering only the fact that such cessation of operations was a possibility that had occurred in other cases, the Area Director seems not to have considered how the actual drilling of the unit wells in Sections 29 and 32 affected his general analysis.

Moreover, as the Tribe has observed, there is no indication that the Area Director considered his own regulatory power over oil and gas leases on tribal lands in his analysis of what would be in the best interests of the Tribe. For example, under the applicable regulations, the Secretary

is authorized to approve or disapprove the commencement of drilling, the suspension of drilling, and the abandonment of wells that have been drilled. *See* 43 C.F.R. §3162.3-1, 43 C.F.R. §3162.2, 43 C.F.R. §3162.3-4. The Secretary may also impose sanctions on lessees that do not comply with the applicable regulations. *See* 43 C.F.R. §3163.1, 43 C.F.R. §3163.2.

As the Tribe notes, these regulatory powers gave the Area Director a number of options as he considered whether or not to approve the subject communitization agreements in May of 1981. First, instead of merely approving or disapproving the communitization agreements, the Area Director could have made his approval conditional on renegotiation of the leases on terms more favorable to the Tribe. In addition, if a modification of the 1976 leases or a negotiation of new leases could not have been achieved, the Area Director could, pursuant to 25 U.S.C. §396d, communitize the subject tracts as unleased lands so that they could participate in any production from the unit well until new leases could be negotiated. In addition, if the anticipated cessation of drilling operations occurred in response to disapproval of the communitization agreements, the Area Director could have taken certain punitive measures against the lessees such that the cessation of drilling would be discouraged.

The explanatory memoranda and the Secretary's response to the Order of Remand indicate that the Area Director considered none of these options. Indeed, the response to the Order of Remand expressly states that such options were *not* considered because there were factors beyond the Area Director's control that rendered the Area Director powerless to prevent the decrease in tribal revenues that would result if the communitization agreements were disapproved.

To be sure, if the Area Director was indeed powerless to prevent the decrease in tribal revenues that would result from disapproval of the communitization agreements, one could not conclude that the Area Director breached his fiduciary obligations in approving the agreements. However, the Area Director's assessment of his own powerlessness was not based on an evaluation of the conditions existing in Sections 29 and 32 in 1981. His approach was analogous to that of an outfielder who, after chasing a long fly ball to the fence, fails to jump for the ball because, in a previous game, the wind blew a similar hit out of the park. If the outfielder's conclusion about the wind was not based on an assessment of the conditions prevailing on the day of the game, one would be justified in concluding that, in failing to jump for the ball, he failed to perform as he should have. Similarly, because he did not consider contemporary conditions in Sections 29 and 32, the Court finds the Area Director's conclusion that there was nothing he could do to protect the Tribe's economic interests if the communitization agreements were disapproved to be inconsistent with his fiduciary obligations to the Tribe.

The Area Director's actions are similar to those involved in *McClanahan v. Hodel*, Case No. 83-161-M (Civil), slip op. (D.N.M. August 14, 1987). In *McClanahan*, a group of Navaho Indians holding allotted tracts entered into uranium mining leases with Mobil Oil Company in 1972. The leases provided for primary terms of ten years and for automatic secondary terms if Mobil obtained commercial production by the end of the primary terms. If commercial production was not achieved, the leases would be put up for competitive bidding at the end of the primary terms.

By 1977, Mobil had commenced development of the

leases, and it appeared that they would be tremendously profitable. However, fearing that it would not be able to reach commercial production by the end of the primary terms of the leases, Mobil sought to renegotiate them. Mobil proposed an amendment to the leases that would extend their primary terms for two years and would provide certain increased benefits to the Indian lessors, including an increased royalty rate, a bonus, and an increased rental amount. Upon review of Mobil's proposal, the Commissioner of the BIA suggested that new leases be negotiated for ten years and that the new leases contain a clause that would allow the royalty rate to be reviewed two years after the commencement of commercial production and every five years thereafter. The local Area Director then concluded that the same bonus and increased rents and royalty rates that had been suggested for the two-year lease extensions should be included in the new ten-year leases. Although not all of the Indian lessors consented to these new terms, the Assistant Secretary approved the new leases.

Upon review of the Assistant Secretary's approval, the Court in *McClanahan* concluded that the approval was invalid for two reasons: (1) because the Secretary lacked the statutory authority to approve the leases without the unanimous consent of the Indian lessors; and (2) because, in approving the leases, the Secretary breached his trust responsibilities to the Indian mineral interest owners.

As to the latter conclusion, the Court found that in light of the tremendous profits that Mobil seemed likely to achieve upon developing the subject tracts, some "hard bargaining" with Mobil was called for on the part of those seeking to protect the interests of the Indian lessors. *Id.* at 17. The Court found that it was a clear breach of the trust responsibilities of the Secretary and his delegates for them to refuse "to exact of Mobil one jot more than Mobil originally

offered." *Id.* at 17. In discussing several specific instances in which the Secretary and his delegates failed to meet their trust obligations, the court noted that the BIA had repeatedly refused certain lessors' requests that an economic analysis of the subject tracts be performed. The court referred to statements in the BIA's own manual that "[a] well - supported economic appraisal is essential to meaningful evaluation of any transaction involving Indian lands." *Id.* at 18.

The Court finds the reasoning of *McClanahan* applicable in the instant case. Here, in the Anadarko Basin in 1981, the economic climate was extremely favorable for those leasing mineral interests and leases were being negotiated on terms considerably more favorable to lessors than they had been in previous years. A fiduciary seeking to protect the interests of such Indian lessors should have taken measures to reap the benefits of this economically favorable climate, or, at least, explored what measures were possible. However, in approving the subject communitization agreements, the Acting Area Director based his analysis on general considerations and made an inadequate study of contemporary conditions in the particular sections involved. In addition, instead of attempting to employ his regulatory powers to protect the Tribe's interests, the Area Director concluded, without exploring any options, that if he disapproved the subject communitization agreements, there was nothing he could do to protect tribal revenues from adverse reactions by the losing lessees. Had this conclusion been based on the study of conditions prevailing at that time, this conclusion might be supportable. However, the conclusion was not based on such a study.

Accordingly, the Court finds that, in approving the subject communitization agreements, the Area Director breached his trust responsibility to the Tribe under the MLA. Therefore, the subject communitization agreements do not

extend the non-drilling 1976 leases, and these leases thus expired at the end of their primary terms.[3]

V. Conflict Between 1976 Leases and the Mineral Leasing Act

The Tribe further argues that all of the 1976 leases expired at the end of their primary terms because certain provisions of the leases purporting to extend them beyond these terms violate the MLA. In response, the federal

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[3] In the Court's opinion, this finding is not inconsistent with the Tenth Circuit's recent opinion in *Cotton Petroleum Corp., supra*. In *Cotton*, the Tenth Circuit found that, in focusing exclusively on the economic benefit that would be obtained by an Indian lessor if a communitization agreement were disapproved such that a lease could be renegotiated, the Assistant Secretary failed to consider all the relevant factors under *Kenai* and the BIA guidelines issued pursuant to that decision. In particular, the Court found that the Assistant Secretary did not analyze and discuss "the long term economic effects" of the agreement, "the engineering and technical aspects of the unit and the communitization agreement covering it," and "any obligation to approve the agreement there may be by virtue of the express language contained in paragraph 11 of the Rose lease [the counterpart of Clause 9]." 870F.2d at 1526.

In the case at bar, the Court's conclusion is that the Area Director breached his fiduciary duty to the Tribe by failing to consider any information as to the marketability of the subject leases. Although *Cotton* clearly indicates that an exclusive concern with this issue is not proper in evaluating a communitization agreement, it does not state that consideration of the marketability issue is improper. Indeed, under this Court's interpretation, *Cotton* reaffirms *Kenai's* conclusion that the economic impact of the approval or disapproval of a particular communitization agreement is one of the relevant factors that must be considered by the Secretary and his delegates in the exercise of their fiduciary responsibilities to the Indians. Since this factor was not properly considered by the Area Director in the instant case, the Tenth Circuit's analysis in *Cotton*, does not controvert the conclusion that the approval of the subject agreements was inconsistent with the Area Director's fiduciary duties.

defendants and Woods contend that since this matter was not raised by the Tribe during its administrative appeals, it can not now be raised before this Court. Accordingly, before considering the merits of the Tribe's argument, the Court must first determine whether this matter is properly before it.

As the defendants have argued, it is well established that a reviewing cannot entertain questions that have not previously been raised before the agency. *Wilson v. Hodel*, 758 F.2d 1369, 1373 (10th Cir. 1985); *Kenai*, 671 F.2d at 388; *Beatrice Foods Co. v. Federal Trade Commission*, 540 F.2d 303, 313 (6th Cir. 1981). One exception to this rule concerns matters of statutory interpretation. *Frontier Airlines v. Civil Aeronautics Board*, 621 F.2d 369, 371 (10th Cir. 1980).

In the case at bar, it is uncontroverted that the issue regarding the purported conflict between the MLA and the 1976 leases was not raised during any of the administrative proceedings. Nevertheless, the gist of the Tribe's argument on this issue involves the interpretation of certain provisions of the MLA. Accordingly, the Court finds that this issue is properly before it.

The Tribe's argument is based on that part of the MLA that concerns the duration of leases of unallotted lands, 25 U.S.C. §396a, which states:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed 10 years and as long thereafter as minerals are produced in paying quantities.

The Tribe contrasts this provision with paragraph 1 of the subject leases, which states that the leases are:

> . . . for the term of 5 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

Paragraph 1 further states:

> If the lessees shall commence to drill a well within the term of this lease, the lessee shall have the right to drill such well to completion with reasonable diligence and if oil or gas or either of them be found in paying quantities this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned.

According to the Tribe, 25 U.S.C. 396a authorizes leases of unallotted lands only for a definite term of years that does not exceed ten years, and these leases may be extended only by the production of minerals in paying quantities during their primary terms. Since, under paragraph 1, the 1976 leases may be extended merely by drilling without the achievement of production, the Tribe argues, this provision of the leases directly violates 25 U.S.C. §396a.

In support of this argument, the Tribe invokes the legislative history of the MLA. It contends that the durational restrictions set forth in 25 U.S.C. §396a are based on similar durational restrictions in an earlier act passed in 1924 (then designated 25 U.S.C. §398). The Tribe cites portions of legislative history of the 1924 act that indicate that one purpose of the act was to conform the terms of tribal leases to the terms of leases of private lands. According to the Tribe, in 1924, the prevailing interpretative rule was that "the habendum clause controls the duration of the lease to the exclusion of conflicting clauses governing drilling obligations." The Tribe contends that it was with this understanding that Congress enacted 25 U.S.C. §396a and that, as a

result, the drilling clauses of the subject leases are in direct conflict with this statute.

For several reasons, the Court does not find the Tribe's argument persuasive. In the first place, because of the manner in which the subject leases were developed, it does not appear that there is any conflict between the subject leases and the express terms of 25 U.S.C. §396a. Specifically, all of the subject leases were for primary terms of five years. Although production was not achieved within that five-year period, it was achieved, in both sections, in less than ten years after the leases were initially approved. Accordingly, if 25 U.S.C. §396a is read simply to bar any leases that remain unproductive for more than ten years, these leases are not barred by the statute. Production was achieved prior to the maximum period.

Moreover, the Tribe's contention that 25 U.S.C. §396a should be read more narrowly to preclude an extension of a lease's primary term (even if that primary term is less than 10 years) unless there is production within that primary term is not supported by the applicable law. In particular, the Tribe's account of the prevailing interpretative rule in 1924 as to conflicts between habendum and drilling clauses in oil and gas leases is misleading.

As one scholar has noted, for a number of years, courts have taken "different views on the manner of interpreting apparently conflicting habendum and drilling clauses. Some have held, as the Tribe now argues, that habendum clauses alone controls the terms of a lease and that "the drilling clause is only designed to control rights during the fixed term and not thereafter." *Kuntz, The Law of Oil and Gas* §26.13 at 411 (1967). These courts conclude that, in spite of the provisions of a drilling clause, a lease "will terminate according to the habendum clause if the lease is not producing at

the end of the primary term." *Id.* at 411; *see* e.g. *Stetson v. Orland Oil Syndicate*, 108 P.2d 463 (Cal. App. 1940); *Humphreys v. Fletcher*, 204 P. 70 (N.M. 1922). In contrast, a number of other courts have concluded that a lease containing a "commence drilling clause" (such as paragraph 1 in the leases here at issue) will not terminate at the end of the primary term set forth in the habendum clause if drilling operations have been commenced in the primary term. *Kuntz*, §26.13 at 409; *see e.g. Lester v. Mid-South Oil Co.*, 296 F.661 (6th Cir. 1924); *Consolidated Gas Co. v. Rieckhoff*, 151 P.2d 588 (Mont. 1944); *Simons v. McDaniel*, 7 P.2d 419 (Okla. 1932); *De Flores v. Smith*, 236 S.W. 505 (Tex. Civ. App. 1922); *Texas Co. v. Curry*, 229 S.W. 643 (Tex. Civ. App. 1921).

As these cases demonstrate, as of 1924 (the determinative date under the Tribe's argument) each interpretive approach had been adopted by a number of courts. Contrary to the Tribe's suggestions, the provisions of the MLA do not indicate the approach to be followed in interpreting a lease of unalloted lands. 25 U.S.C. §396a simply establishes the maximum primary term that may be set forth in a habendum clause of a lease. It does not indicate how this clause should be interpreted in relation to the lease's other clauses, such as the commence drilling clauses here at issue.

However, in *Moncrief v. Pasotex Products Co.*, 280 F.2d 235 (10th Cir. 1960), *cert. den.*, 364 U.S. 912 (1960), in interpreting the provisions of an oil and gas lease on Indian land in Oklahoma, the Tenth Circuit concluded that the approach taken in the Oklahoma, Texas and Montana decisions cited above should be applied. In *Moncrief*, the lessee commenced the drilling of a well during the leases' primary term but did not achieve production by the end of that term. The Court found that "[t]he lessee's right to commence a well

during the [leases'] primary term carries with it, by necessary legal implication, the right to complete the well after expiration of the primary term unless negatived by contract terms or loss by abandonment." 280 F.2d at 237. The court relied on *Simons v. McDaniel, supra*, in which the Oklahoma Supreme Court found that a commence drilling clause was sufficient to extend a lease on which drilling had commenced but on which no production had been achieved by the end of the primary term set forth in the habendum clause. 7 P.2d at 420-422.

The Court finds *Moncrief* directly applicable to the instant case. Since the Tenth Circuit there concluded that, standing alone, the right to commence the drilling of a well within a lease's primary term implicitly includes the right to complete the well after the primary term has expired, there is all the more reason to conclude that the lessee has such a right when the lease in question expressly grants that right by means of a commence drilling clause. Accordingly, the Court concludes that the commence drilling clauses of the subject leases operate to extend those leases if drilling is commenced during the primary term set forth in their habendum clauses. The Tribe's Cross-Motion for Partial Summary Judgment on the Issue of Whether the Woods' Leases Violate the Mineral Leasing Act is therefore denied.

VI. Amendment of Leases by Communitization Agreements

The Tribe next argues that the subject communitization agreements amended all of the 1976 leases such that those leases expired at the end of their primary terms in May of 1981. It relies on the part of the communitization agreements that states:

> EXCEPT as herein modified and changed the oil and gas leases described on Exhibit A shall remain in full force and effect as originally drawn.
>
> It is further agreed that the actual drilling, com-

pletion, continued operation or production of a well or wells for communitized substances on the communitized area shall be construed and considered as the actual drilling, completion, continued operation or production from each and all of the lands within and comprising said communitized area. (Actual drilling is defined: If the lessees shall commence actual drilling with a rig designed to go to the total proposed depth and such drilling shall commence by midnight on the last day of the primary term of this lease and shall continue until the well is fully completed to production or abandoned, the Lessees shall have the right to drill such well to completion with reasonable diligence and if oil or gas, or either of them, are found in paying quantities, this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned.) *All Trust or Restricted leases committed by this agreement are hereby amended to provide that any non-producing zones shall be released at the end of the primary term of said leases.* [Emphasis added]

The Tribe contends that, because of the underlined [Italicized] language, the agreements amended the 1976 leases such that their primary terms could be extended only by production within those terms. Thus, according to the Tribe, this language renders inoperative the drilling clauses of the 1976 leases.

Both the federal defendants and the defendant Woods note that this argument should not be considered by the Court because it was not raised at the administrative level. The Court agrees. In this instance, in contrast to the Tribe's argument regarding the MLA, the Tribe does not raise a question of statutory interpretation, and none of the other exceptions to the requirement of exhaustion of administrative remedies is applicable. The Tribe could have raised this issue

in its administrative appeal of the approval of the communitization agreements but did not. As a result, the Court finds that this matter is not properly before it.

Moreover, even if the matter had been properly raised at the administrative level, the Court finds the arguments presented by the Tribe unpersuasive. In particular, immediately prior to the section of the communitization agreement emphasized by the Tribe, the agreements set forth a definition of "actual drilling" that mirrors the drilling clauses in the 1976 leases. The Tribe's interpretation of the agreements seems to be that the actual drilling definition is rendered inoperative by the following sentence regarding the amendment of leases. This is not a reasonable interpretation of the communitization agreements. The only reasonable interpretation of this part of the agreements is that by the term "nonproducing zones," the communitization agreements refer the zones in which there has been no actual drilling. This interpretation renders the terms of the communitization agreements consistent with one another and harmonizes the provisions of the communitization agreements with the 1976 leases.

Accordingly, the Tribe's Cross Motion for Summary Judgment on the Issue of Whether the Woods' Leases Were Amended by the Communitization Agreements to Condition Extension Beyond Their Primary Terms on Production Rather Than Drilling is denied.

VII. **Conclusion**

In summary, as set forth above, the Court rules as follows: (1) the Tribe's Motion for Partial Summary Judgment on the Tribal Consent and Secretarial Authority Issues is granted in part and denied in part; (2) the Tribe's Cross-Motion for Partial Summary Judgment on the Issue of Whether the Woods' Leases Violate the Indian Mineral Leasing Act of 1938 is denied; (3) the Tribe's Cross-Motion for Summary Judgment on the Issue of Whether the Woods'

Leases Were Amended to Condition Extension Beyond Their Primary Terms on Production Rather Than Drilling is denied; (4) the defendant Woods' Motion for Partial Summary Judgment is granted in part and denied in part; (5) the federal defendants' Motion for Summary Judgment is granted in part and denied in part.

As explained above, the result of these rulings is that the three leases on which no drilling occurred during their primary terms, numbers 14-20-205-6894, 14-20-205-6895, and 14-20-205-6897 expired on May 10, 1981, at the end of their primary terms. As of that date, the Tribe, rather than Woods and Reading and Bates, is the rightful owner of all of the working interest (as well as the royalty interest) in the subject tracts. Since production has been achieved on the subject tracts, the Court's conclusion as to the expiration of the 1976 non-drilling leases entitles the Tribe to certain revenues attributable to the subject tracts after May 10, 1981.

However, in light of the Tenth Circuit's recent decision in *Cotton Petroleum, supra*, and the complexity of the issues here involved, the Court finds pursuant to 28 U.S.C. §1292(b) that this order involves controlling questions of law as to which there is substantial ground for difference of opinion. Moreover, an immediate appeal from this order may ultimately advance the termination of this litigation. Accordingly, within 10 days of the date of the entry of this order the parties may apply to the Court of Appeals for the Tenth Circuit to permit an immediate appeal of this order. If the parties do not appeal the order, the Court will then request procedural recommendations regarding the manner in which the amounts owed to the Tribe should be determined.

It is so ordered this 26th day of May, 1989.

WAYNE E. ALLEY
United States District Judge

Entered in judgment docket 5-26-89

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA,	)	Filed November 13, 1986
Plaintiff,	)	
v.	)	No. CIV-84-1765-A
THE UNITED STATES OF AMERICA, et al.,	)	
Defendents.	)	

ORDER

This case is before the Court for consideration of plaintiff's Motion to Vacate the Secretary of the Interior's Decision on Two Issues and To Remand to the Secretary for Reconsideration and plaintiff's Motion for Clarification of the grounds on which this Court denied summary judgment. The plaintiff Cheyenne-Arapaho Tribes of Oklahoma (the Tribe) also proposes analytical and procedural guidelines for the Secretary's proceedings on remand.

The Acting Area Director of the Anadarko Office of the Bureau of Indian Affairs (the Director) approved communitization agreements extending the primary terms of oil and gas leases on land in Custer County, Oklahoma held in trust by the United States for the Tribe. Before bringing this action, the Tribe appealed the Director's decision on several grounds, first to the Deputy Assistant Secretary of Indian Affairs and then to the Board of Indian Appeals on direct appeal and in a petition for rehearing. In each instance, the Director's decision was affirmed.

The Tribe asserts that the administrative record is inadequate

for judicial review of the Board's final decision on two issues and seeks a remand to the Secretary of the Interior. Both the defendant Woods Petroleum Corporation ("Woods"), the lessee who benefited from the extension of lease terms, and the federal defendants argue that the record is adequate; the federal defendants add that the Tribe did not question the adequacy of the record during its administrative appeal, so that matter cannot now be considered by this Court.

The two issues on which the Tribe seeks remand are discussed separately below, and the question of plaintiff's failure to raise the adequancy of the record earlier is treated under each.

(i)

The first issue concerns the Interior Department's interpretation of clause 9 of the leases:

> 9. Unit Operation: The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supetvision.

In its administrative appeals, the Tribe argued that communitization agreements extending the terms of these leases could not become effective without its particular consent to the very agreements. Both the Deputy Assistant Secretary and Board of Indian Appeals found that clause 9 unambiguously gave advance general consent, obviating any need for tribal action on a particular communtization plan. The Tribe's position now is that clause 9 is ambiguous on its face, and that the Secretary on remand should construe the clause in accordance with principles of contract law and the provisions of the Mineral Leasing Act of 1938, 25 U.S.C.A. §396 a-g.

As a preliminary matter, the Court must consider whether this issue is properly before it. Despite the fact that the Tribe now, and for the first time, frames this issue in terms of the adequancy of the administrative record, the gravamen of its argument is that clause 9 is ambiguous. This is a question of law, *Walker v. Telex*, 583 P.2d 482 (Okla. 1978), that has been briefed by all of the parties.

Under the Administrative Procedure Act, a reviewing court is responsible to correct errors of law by agencies. *N.L.R.B. v. Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and Vicinity, Local Union Number 638*, 429 U.S. 507, 522 (1977). When a court determines that an agency has made an error of law, the proper course is to remand the case to the agency so that it can make findings in accordance with the law. 429 U.S. at 522. If as a matter of law, clause 9 of the instant leases is ambiguous, the remedy of remand is suitable here.

The way the Tribe parses clause 9, the words "any agreement" might mean either an agreement between the parties to the lease (Woods and the Tribe) or an agreement among a majority of the operating interest. Therefore, the clause might mean that Woods and the Tribe will abide by any communitization agreement the two of them reach if and when their agreement is adopted by the operating interest owners and approved by the Secretary, or that, without regard to their desires at the time, Woods and the Tribe are obligated to comply with any agreement reached by a majority of the operating interest and approved by the Secretary.

Under Oklahoma law, the language of a contract is unambiguous if it is reasonably and faily susceptible to only one meaning. *Taylor v. Beech Aircraft Corp.*, 407 F.Supp. 69 (W.D. Okla. 1976). The test is not whether more than one meaning is imaginable, for "any well trained lawyer can create ambiguities in even the most straightforward of

sentences", *Southwest Stationary and Bank Supply, Inc. v. Harris Corp.*, 624 F.2d 168, 170 (10th Cir. 1980), but whether only one interpretation is reasonable.

In determining what is a reasonable interpretation, one should refer to several rules regarding the construction of contracts. The paramount goal is determining the intent of the parties. OKLA. STAT. tit. 15, §152 (1985); *Paterson v. Southwestern Bell Telephone Co.*, 411 F.Supp. 79 (W.D. Okla. 1976). The intention of the parties must be found in the whole of the contract, and, if possible, the contract should be construed to give effect to each of its provisions. OKLA. STAT. tit. 15, §157 (1985); *Amoco Production Co. v. Lindley*, 609 P.2d 733 (Okla 1980). If a contract contains apparently conflicting provisions, they should be reconciled with its general purpose. OKLA. STAT. tit. 15, §168 (1985); *Paclawski v. Bristol Laboratories, Inc.*, 425 P.2d 452 (Okla. 1967). Finally, standardized or printed contracts are construed against the party preparing the form. *Wilson v. Travelers Insurance Co.*, 605 P.2d 1327 (Okla. 1980).

In light of these rules, this Court must determine if there is more than one reasonable interpretation of clause 9, taking note that the clause is part of a standard form contract prepared by the Interior Department.

The Tribe's argument regarding ambiguity has support in the clause's language. The term "any agreement" does not specify which parties the agreement is between. Although the phrase "if and when collectively adopted by a majority of the operating interest therein and approved by the Secretary of the Interior during the period of supervision" modifies the term "any agreement", a question remains whether this phrase defines "agreement" as any agreement originally arrived at by the majority of the operating interest without involvement of the parties to the lease.

The key to defining "any agreement" is in the meaning of the word "adopted." According to WEBSTER'S THIRD

NEW INTERNATIONAL DICTIONARY (1981), "adopt" can mean:

> 1. To take by free choice into a close relationship previously not existing, especially by a formal legal act . . . 2. To take up or accept, especially as a practice or tenet often evolved by another . . . 3. To accept formally, acknowledge or enact as true, wise, fitting, germane . . . 4. To use as wonted or accustomed . . . 5. To endorse and assume official responsibility for . . . 6. To choose (a textbook) for required study in a school subject.

It adds, " '[a]dopt' may stress the fact that the belief or practice is not of one's own invention, but is voluntarily taken from another's example." Similarly, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1985) states, " '[a]dopt' implies accepting something created by another or foreign to one's nature."

If adopt merely means to "accept formally" or "endorse", then the term "any agreement" can reasonably be interpreted as any agreement originally arrived at by a majority of the working interest owners. Clause 9 would then mean that the parties to the lease committed themselves in advance to accept the agreements of the operating interest owners for cooperative or unit development. Yet, if "adopted" implies accepting something created by another, then "any agreement" might reasonably be "any agreement between the parties to the lease." Under this construction of clause 9, the parties to the lease would negotiate an agreement that would become binding on them when the majority of the operating interest accepted it and the Secretary of the Interior approved it. Looking only to the language of clause 9, the Court concludes that both of these interpretations are reasonable. However, in accordance with the rules of construction discussed above, other portions of the contract must be considered in interpreting the clause.

Clause 3(g) of the leases states that the lessee agrees to "abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases . . . ." One of those regulations, 25 C.F.R. §221.21, first promulgated in December of 1957 under the authority of the Mineral Leasing Act, directly affects the agreements for cooperative and unit development to which clause 9 refers. It states:

> Restrictions on Operations:
>
> (a) Oil and gas leases issued under the provisions of the regulations in this part shall be subject to imposition by the Secretary of the Interior of such restrictions as to time or times for the drilling of wells and as to the production of any well or wells as in his judgment may be necessary or proper for the protection of the natural resources of the leased land and in the interest of the lessor. In the exercise of his judgment, the Secretary of the Interior may take into consideration, among other things, the Federal laws, state laws, regulations by competent Federal or State authorities, lawful agreements among operators regulating either drilling or production, or both, and any regulatory action desired by tribal authorities.
>
> (b) All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, *but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.* (Emphasis added).

Although the regulation requires tribal consent to communitization agreements, it does not specify how this consent is to be obtained and signified, who is authorized to consent for the tribe, whose responsibility it is to obtain the consent of the tribe, or whether it is possible for blanket tribal con-

sent to be obtained for all future communitization agreements pertaining to a particular lease.

In the Administrative appeals of the Director's decision, both the Deputy Assistant Secretary and the Board of Indian Appeals concluded, without explanation, that, because of clause 9, the Tribe's initial execution of the leases constituted its consent to the communitization agreements, satisfying 25 C.F.R. §211.21(b). While great deference is to be given to an agency's interpretation of its own regulations, *United States v. Larinoff,* 431 U.S. 864 (1977), this deference is possible only when a reviewing court knows what the administrative interpretation is from the record before it; this cannot be determined from the record here. Moreover, 25 C.F.R. §211.21(b) on its face creates an additional ambiguity that neither the Deputy Assistant Secretary or the Board seems to have considered.

The ambiguity arises from the duties that the regulation imposes on the Secretary (e.g., the duty to protect the natural resources of the leased land and the duty to protect the interests of the lessor). Since the regulation also requires tribal consent to communitization agreements, it is reasonable to conclude that the Secretary is responsible to obtain this consent and that he cannot finally approve these agreements until tribal consent is obtained. This interpretation is supported by the principle that "whenever doubt or ambiguity exists in federal statutes or regulations, such doubt is resolved in favor of the tribes." *Jicarilla Apache Tribe v. Supron Energy Corp.,* 728 F.2d 1555, 1563 (10th Cir. 1984), (Seymour, J., concurring in part and dissenting in part), dissenting opinion adopted as the majority opinion as modified, 782 F.2d 855 (10th Cir. 1986) (en banc).

If the regulation is interpreted in this manner, the clause 9 provision that communitization agreements are to become effective only after approval by the Secretary implies that the Secretary will have obtained the consent of the Tribe as

a prerequisite to this approval. So interpreted, the clause would have the same meaning as the regulation, namely that a tribe must specifically consent to the communitization agreements before they become effective.

This interpretation comports with the Ninth Circuit's recent articulation of the purposes of the Mineral Leasing Act. In *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation of the State of Montana,* 792 F.2d 782, 796 (9th Cir. 1986), the court declared that the Act was passed with a threefold purpose: "to achieve uniformity in tribal leasing matters, to increase Indian authority in granting leases, and to protect the Indians' economic return in their property." If clause 9 is interpreted as restating the requirement of tribal consent in 25 C.F.R. §211.21(b), it serves to increase both the Indians' authority in granting leases and their participation in decisions affecting the economic return on their property.

Therefore, after reviewing clause 9 of the leases, 25 C.F.R. §211.21(b), the Mineral Leasing Act, and the rules of contract construction outlined above, the Court concludes that clause 9 is ambiguous with regard to the need for tribal consent to communitization agreements. The conclusion of the Deputy Assistant Secretary and the Board of Indian Appeals to the contrary constitute errors of law.

In situations in which the language of the contract is ambiguous as a matter of law, the interpretation of the contract becomes a question of fact; evidence extrinsic to the contract is admissible to determine the intent of the parties. *Devine v. Ladd Petroleum Corp.,* 743 F.2d 745, 748 (10th Cir. 1984). The words and acts of the parties may be considered by the trier of fact as practical constructions of the contract. *Paterson,* 411 F.Supp. at 83-85. This principle has been applied by the Tenth Circuit to Indian mining leases. *Whitebird v. Eagle-Picher Co.,* 390 F.2d 831 (10th Cir. 1968).

In the case at bar, the administrative record contains some evidence that the parties to the lease believed that the Tribe's specific consent to the communitization agreements was required, despite a possible interpretation of clause 9 to the contrary. First, the Tribe's consent to the communitization agreement was actively sought by one of the operating interest owners, Reading and Bates Petroleum Co., during the months before the expiration of the primary terms of the leases. Second, internal memoranda from the Bureau of Indian Affairs (BIA) suggest that, at least until June of 1981, some officials believed that additional tribal consent to communitization agreements was required notwithstanding clause 9.[1]

Because of the erroneous conclusion of the Deputy Assistant Secretary and the Board of Indian Appeals that clause 9 is unambiguous, this evidence concerning the intent and understanding of the parties to the lease was not con-

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[1]BIA guidelines for the Anadarko Area office, published on September 20, 1971, state that "with respect to tribal lands, ratification by the tribe is neccessary before committing their lands to a unit agreement." On June 11, 1981, after the communitization agreements in the case at bar were approved, the Acting Deputy Assistant Secretary of Indian Affairs wrote a memorandum to the Anadarko Area Director regarding the need for tribal consent to communitization agreements. The Assistant Secretary stated that a tribe's execution of a lease containing clause 9 constituted tribal consent to communitization agreements. The Assistant Secretary sent another memorandum to the Anadarko office on August 18, 1981. There he state that, although certain BIA offices had required tribal consent to commitization agreements in the past, the Bureau would not require tribal consent where the corresponding lease contains provisions such as clause 9. According to the Assistant Secretary, this interpretation was required by the August 11, 1981 ruling in *Sanguine, Ltd. v. Department of Interior,* CIV-81-917-E (W.D. Okla. 1981). All of this suggests that, at the time the communitization agreements in the case at bar were approved, there was confusion regarding the need for tribal consent.

sidered. Therefore, upon remand, the Secretary should explain how he interprets this evidence in accordance with the guidelines provided below.

(ii)

The second issue upon which the Tribe seeks remand concerns the authority of the Director to approve the communitization agreements. The Tribe alleges that the present administrative record is inadequate for a determination whether the Director's approval of the agreements violated its right to due process of law. According to Tribe, this "due process issue" consists of three sub-parts: (1) whether the Acting Area Director exceeded his statutory authority; (2) whether his action was arbitrary and capricious; and (3) whether the procedures employed by him complied with applicable law. In addition, the Tribe argues that even if the Director did not violate its due process rights, the Secretary should review his decision to determine if it is erroneous.

The Court finds that this issue is also properly before it. The Tribe has raised the authority issue in its administrative appeals and in the complaint it has filed with this Court.

(a) The Tribe first argues that the Secretary of the Interior's authority must be premised on a factual finding that his action is in its best economic interest and maximizes its lease revenues. It urges the Court to remand the case so that the Secretary can determine if the required factual findings were made within his department.

The Tribe bases its argument on the Tenth Circuit's ruling in *Kenai Oil & Gas, Inc. v. Department of Interior,* 671 F.2d 383, 387 (10th Cir. 1982), where it was held that, in deciding whether to approve communitization agreements covering Indian lands, the Secretary of the Interior and his subordinates have broad discretion to consider all factors affecting the Indian's interests, including matters of conservation, production, and tribal economic interest.

However, this discretion must be exercised conformably with the Interior Department's fiduciary duty to the Indians:

> While it is true that 25 U.S.C. §396d and 25 C.F.R. §171.21(b) do not detail any specific standards governing the exercise of the Secretary's discretion in approving communitization agreements, those actions nevertheless are limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands. Pursuant to the trust responsibilities of the United States, the Department of the Interior is charged with the administration and supervision of oil and gas leases on restricted tribal lands. Acting in the capacity as trustee, the Secretary and his delegate, the Superintendent of the BIA, must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues. 671 F.2d at 386. (Citations omitted).

According to the Tribe, *Kenai* implies that Interior Department officials approving communitization agreements must first make factual findings that the agreements would be in the best economic interests of the Tribe and would maximize lease revenues. To impose such a requirement of explicit factual findings, however, would be to hold that economic factors are the only ones relevant to decisions regarding communitization agreements. This is not what the 10th Circuit held in *Kenai.*

Instead, the Tenth Circuit held that "[i]f the Superintendent considered all the relevant factors in reaching his decision and has made no clear error in judgment, his action cannot be overturned." 671 F.2d at 386. The "relevant factors" include the economic effects of the agreements but are not limited to them. 671 F.2d at 387. Accordingly, remand to require so limited specific factual findings sought by the Tribe is not justified.

(b) As a second part of "the authority issue", the Tribe argues that the case should be remanded to the Secretary to determine if the Director's decision was arbitrary and capricious.

Since the approval of communitization agreements is committed to the Secretary of the Interior's discretion, this Court must determine if the Secretary's approval of the agreements was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C.A. §706(2) (A). *See Citizen to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416-417 (1971). Under this standard, the Court must consider "whether the decision was based on a consideration of all the relevant factors and whether there is a clear error in judgment." *Overton Park,* 401 U.S. at 416. "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency." 401 U.S. at 416. Nevertheless, an agency must articulate both the grounds for its decision and the essential facts upon which the decision is made. *Dunlop v. Bachowski,* 421 U.S. 560 (1975). There must be "a rational connection between the factors found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962). *See also Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 (1974).

As noted above, the "relevant factors" that the Secretary of the Interior and his subordinates must consider in deciding whether to approve communitization agreements have been restated in the Tenth Circuit's *Kenai* decision. Under *Kenai,* the Secretary must, as a fiduciary to the Indians, consider their economic interests; he also has a duty to maximize lease revenues. 671 F.2d at 386.[2]

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[2] *Kenai* also states that issues of conservation and production are relevant factors which the Secretary and his subordinates must consider. 671 F.2d at 387. The Tribe does not argue that these factors were not considered here.

On April 22, 1982, in response to the *Kenai* decision, the BIA issued guidelines for the approval of communitization agreements. 47 Fed. Reg. 26,920 (1982). They provide that the decisions of Area Directors and Superintendents regarding communitization agreements must be "based on logical engineering and economic facts." Moreover, "[t]he long term economic effects of the agreement must be in the best interest of the Indian lessor and we must be able to document these effects." The guidelines also require review of the technical aspects of the agreement by Mineral Management Service.

Although the Director's decision to approve the instant communitization agreements preceded both the issuance of these guidelines and the Tenth Circuit's decision in *Kenai,* these two elaborations of "the relevant factors" had been issued before the later stages of the administrative appeal. In fact, in its second opinion, issued after the Tribe's petition for rehearing was granted, the Board of Indian Appeals referred to both the *Kenai* decision and the new guidelines; it concluded that under these new standards, the Director had considered all the relevant factors. This Court must now review the reasons supplied by the Interior Department for the approval of these communitization agreements to determine if, in accordance with *Kenai* and the guidelines, all of the relevant factors were indeed considered.

The reasons for the Director's approval of the agreements are recited in two memoranda from the BIA dated May 5, 1983 and October 3, 1983. They were written by BIA officials in response to the Board of Indian Appeals' request for additional information, the Board having determined that this information was necessary for an evaluation of the Tribe's request for rehearing.

The May 5, 1983 memorandum first responds to the Tribe's argument that, if the agreements had not been approved, new and more lucrative leases could have been

negotiated. It states that there was also a possibility that expiring leases could not be leased again. It adds that the Area Office of the BIA considered the authority of the Oklahoma Corporation Commission to de-space the expiring leases from the established spacing unit; if the communitization agreements were not approved, the operator could seek approval from the Commission for this de-spacing. According to the BIA, de-spacing would result in a loss of net revenues to the Tribe and would create such a legal controversy that title to the land involved would be rendered unmarketable. The memorandum concludes with a statement of general policy:

> We are of the opinion that a uniform policy of refusing to approve communitization agreements in logically spaced area solely for the reasons that the mineral owners might receive additional revenues will eventually diminish the sale of Indian land leases and will not be in the best long term interests of the Indians.

The memorandum of October 3, 1983 adds that several other factors were considered before the communitization agreements were approved. First, the agreements were reviewed and approved by the United States Geological Survey (USGS). The USGS explained that if the reservoir spacing established in the agreements was not followed, the reservoir would be developed under the rule of capture and that this would result in lower recovery of oil and/or gas, to the detriment of all interests. Second, according to the memorandum, the Director determined that, if communitization agreements were not approved, the operator/lessee might elect to seek relief through administrative procedure or the courts. This, the Director concluded, could preclude the development of the well and dissuade others from leasing the surrounding land.

The Tribe argues that these memoranda do not evince a consideration of all the relevant factors because no com-

petent evidence of the market value and marketability of the leases was obtained. Both Woods and the federal defendants respond that the memoranda demonstrate that the Director gave full consideration to issues of conservation, production, and tribal economic interest. Woods adds that the Director was entitled to rely on the expert evaluations of the USGS officials and the Concho Agency office of the BIA, both of whom recommended approval of the agreements. The federal defendants further allege that this Court's review of the agency's decision should go no further than the Tenth Circuit's in *Kenai.* Thus, to resolve this part of the dispute, the Court must determine if a consideration of the market value and marketability of the leases that could have been negotiated if the communitization agreements were not approved is an essential part of the Secretary's duty to maximize lease revenues and act in the best interest of the Indians. If so, the Court must then determine whether such consideration was given.

The Tribe's argument is supported most directly by the language of *Kenai* that imposes a duty on the Secretary and his subordinates to maximize tribal lease revenues. 671 F.2d at 386. Since Interior Department officals are charged with this responsibility, they must "not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." *Jicarilla,* 728 F.2d at 1563.

When a fiduciary sells trust property, he must obtain the best possible price. *Rippey v. Denver United States National Bank,* 273 F.Supp. 719, 739-740 (D. Colo., 1967). To insure that he does not accept too low a price, the fiduciary must determine the value of the property before offering it for sale, either by testing its value on the open market or having it appraised. *Allard v. Pacific National Bank,* 663 P.2d 104 (Wash. 1983).

To be sure, the position of the Secretary and his sub-

ordinates is not identical with that of a private trustee selling trust property. Because of the discretion granted him by the Mineral Leasing Act, the Director was not required to refuse to approve the communitization agreements by blanket policy and to put the leases on the market. However, allowing a renegotiation of the leases folowing a refusal to approve the agreements was an option available to him. In order to assess the impact of this option on the economic interests of the Indians and to compare it to other options (e.g., extending the leases by approving the agreements), information regarding the market value and marketability of the leases was essential.

The importance of this information becomes apparent when it is considered in relation to the reasons for its decision actually provided by the BIA. In discussing both the litigation and de-spacing that might ensue if the agreements were not approved, the BIA predicted how both could be detrimental to the Tribe's interests. A fiduciary should game out the options and make the relevant comparisons. It is possible that the increased revenue from the new leases would have more than offset any loss due to legal fees and the forfeiture of royalties from the de-spaced tracts. Without information regarding the market value and marketability of the leases, no informed conclusions can be reached.

Further, although the Court agrees with the federal defendants that it should not review the Area Director's decision any more carefully than did the Tenth Circuit in *Kenai,* it does not agree that *Kenai* obliges the Court to conclude that the Director considered all the relevant factors. In *Kenai,* the Superintendent of the BIA determined that the land at issue could be re-leased for higher royalties or bonuses. 671 F.2d at 387. Because of this determination, he refused to approve communitization agreements extending the primary terms of the leases. It is precisely this kind of consideration that is *not* apparent in the administrative record

here. The explanatory memoranda state only that the value of new leases was speculative. In order to satisfy its fiduciary duty to maximize lease revenues, the BIA must do more than dismiss the matter in this off-hand manner. It must consider what revenue the Tribe could have obtained if the agreement had not been approved and its land had been re-leased.

The BIA's explanatory memoranda also suggest that maximizing short term revenues is not necessarily in the best interests of the Tribe. If, as is suggested there, a failure to approve these communitization agreements would lead to a disorderly development of mineral reserves and would in the long run deplete the reserves to the detriment of all interest owners, then the Director's approval, while perhaps not maximizing short term revenues, might nevertheless be in the long term interest of the Tribe. This would satisfy the *Kenai* standard.

However, the BIA's analysis in its explanatory memoranda confuses a refusal to approve these particular communitization agreements with a general policy of never approving communitization agreements. Such a blanket policy is not urged by the Tribe or, from this record, by anyone else. It is faulty reasoning for BIA to justify approving this agreement on grounds that it should not disapprove such agreements across the board. A refusal to approve these agreements does not mean that leases on the land involved would never be communitized again. Indeed, once new lease terms were negotiated, new communitization agreements might have been reached. Furthermore, under 25 C.F.R. §211.21(a) the Secretary is authorized to impose such restrictions on the drilling and production as are necessary to protect the natural resources of the leased lands. In the absence of communitization agreements, the Secretary may have been able to employ this power to protect the mineral reserves under the leased land from unnecessary depletion.

These considerations are central to an informed evalua-

tion of what actions would be in the best long term interest of the Tribe; the Court concludes that they are relevant factors that the BIA and the Director should have considered. If the BIA equates its declining to approve one set of communitization agreements with a blanket policy never to communitize oil and gas leases, then such agreements will never receive the kind of individual scrutiny that *Kenai* and the resulting BIA guidelines require. Similarly, the BIA should not be permitted to ignore its own responsibility to impose those restrictions on drilling and production necessary to protect the natural resources of the leased land merely because communitization agreements are another possible means to that end.

In addition, the explanatory memorandas' discussion of the de-spacing of tribal tracts that might have occurred if the communitization agreements had not been approved fails to consider another relevant factor: the location of the unit wells in question. Both wells are located on tracts owned by the Tribe. Moreover, as the Tribe notes, the Oklahoma Corporation Commission has no jurisdiction over these tracts. *Samedan Oil Corp. v. Cotton Petroleum Corp.*, 466 F.Supp. 521, 526, (D.C. Okla. 1978). Any communitization of production from wells located on such tribal tracts must be implemented by means of communitization agreements approved by the Secretary of the Interior. 466 F.Supp. at 526.

The explanatory memoranda ignore this jurisdictional limitation regarding wells located on tribal tracts. They state that the failure to approve communitization agreements followed by the de-spacing of tribal tracts would result in production from the unit wells being allocated among fewer tribal tracts, thus decreasing the Tribe's net revenues. The memoranda fail to consider the fact that, in the absence of communitization agreements, production from the unit wells could not be communitized at all. With no communitization

of production, the Tribe would not share the revenues from the unit well with those holding royalty interests in adjoining tracts. Thus, the absence of communitization would seem to increase the Tribe's net revenues. The memoranda fail to explain how it could decrease them. Perhaps this reflects the basic problem in the administrative consideration of this matter, namely an apparent failure to distinguish between communitization where the producing wells are not on Indian land and where they are on Indian land.

In summary, from a review of the administrative record concerning the factors considered in approving the instant communitization agreements, the Court concludes that the Director failed to consider four of the relevant factors: (1) the market value and marketability of the new leases which could have been negotiated by the Tribe if the communitization agreements had not been approved; (2) the possibility that communitization agreements applying to such new leases could have been obtained; (3) the power of the Secretary to impose restrictions on drilling and production on the leased land if this was necessary to protect the mineral reserves located there; and (4) the fact that the unit wells are located on tribal tracts. The case will be remanded to the Secretary for a consideration of these issues.

(c) In the third part of its "due process" argument, Tribe argues that the case should be remanded to determine if the Director's decision making procedure was proper. The Tribe states that the Secretary should be instructed that the Director was required to notify it of his decision to approve the agreements, inform it of the factual and legal grounds for its decision, and afford it an opportunity to offer evidence and argument to the contrary. This argument has been previously advanced in the Tribe's Motion for a Trial de Novo. It was rejected by the Court in its hearing on January 17, 1986. As noted above, the Mineral Leasing Act commits the approval of communitization agreements to the Sec-

retary's discretion. 25 U.S.C.A. §396d. No statute requires that decisions regarding communitization agreements be made on the record after an opportunity for a hearing, and the Tribe has failed to demonstrate that it possessed the kind of entitlement of which it could not be deprived without an evidentiary hearing. *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Matthews v. Eldridge,* 424 U.S. 319 (1976).

The Tribe also argues, in concluding its discussion of the "authority issue", that the Secretary should review the decision of his subordinates to determine whether it is erroneous. Since this case has already passed through several administrative tribunals, a general order on remand to consider the merits of the Director's decision would not be useful. In *Gray v. Johnson,* 395 F.2d 533 (10th Cir., 1968), the case the Tribe invokes as authority for such a procedure, the Secretary's review occurred at the initial administrative level and not upon remand. Where, as in this case, the reviewing court has determined that an agency has committed certain errors of law and has failed to consider certain relevant factors, the proper course is to remand to allow the agency to make findings in accordance with the law and to consider those factors. *Enterprise Association,* 429 U.S. at 522; *Asarco v. E.P.A.,* 616 F.2d 1153 (9th Cir. 1980). The Secretary need not undertake a general review of the Director's decision to determine if it is erroneous.

(iii)

The Tribe has suggested a number of analytical and procedural guidelines for the proceedings on remand. However, "absent constitutional constraints or extremely compelling circumstances, the administrative agencies should be free to fashion their own rules of procedure and methods of inquiry permitting them to discharge their multifarious duties." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 543 (1978) (quoting *FCC*

v. Schreiber, 381 U.S. 279, 290 (1965)). *See Phillips Petroleum Co. v. Environmental Protection Agency,* No. 85-1039, slip. op. at 30 (10th Cir. Oct. 10, 1986). Thus, the Court cannot direct the Secretary of the Interior to employ any decision-making procedures beyond those required by the Constitution, the Administrative Procedure Act, and other applicable statutes and regulations.

The Tribe first argues that the sections of the Administrative Procedure Act relating to adjudicatory hearings, 5 U.S.C.A. §554 and 5 U.S.C.A. §556 should control the process on remand. 5 U.S.C.A. §554 and 5 U.S.C.A. §556 apply when adjudications are "required by statute to be determined on the record after opportunity for an agency hearing." The Tribe has cited no statute that requires BIA decisions regarding communitization agreements to be made on the record after an opportunity for a hearing. The words "required by statute" in 5 U.S.C.A. §554 have been held to connote required by "procedural due process of law." *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49 (1950). However, the Court there held that 5 U.S.C.A. §554 applies to deportation decisions only because earlier Supreme Court decisions have held that deportation hearings are constitutionally required. No such prior constitutional litigation foreshadows the instant issue, so the procedures outlined in 5 U.S.C.A. §554 and 5 U.S.C.A. §556 need not be employed on remand.

The Tribe also argues that principles of procedural due process require an evidentiary hearing on remand, no matter how 5 U.S.C.A. §554 and 5 U.S.C.A. §556 are construed, because the Director's approval of the communitization agreements affected two of its property interests: its interest as an owner of the mineral estates involved and its interest as the beneficiary of the trust established by the Mineral Leasing Act of 1938, 25 U.S.C. §396 a-g. This argument is also without merit.

In *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), the

Supreme Court held that three factors must be considered in determining the decision making procedures that due process requires before individuals can be deprived of liberty or property interests: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such an interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Thus, "due process is flexible and calls for such procedural protections as the particular situation demands." 424 U.S. at 334, (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)).

Upon considering these factors, the Court concludes that an evidentiary hearing is not required upon remand. First, although the Court agrees with the Tribe that the Director's approval of the communitization agreements affected its property interests, it notes that the purpose of the remand proceedings requested by the Tribe is only to supplement the present record; the remand proceedings themselves will not deprive the Tribe of its property interests. Second, the Tribe has failed to explain how an evidentiary hearing would assist the decision-maker in the remand proceedings. In contrast to other cases in which evidentiary hearings have been held to be required by due process, here such procedures as oral arguments, discovery of evidence, and examination of witnesses are not necessary for informed decision-making. *See, e.g., Goldberg v. Kelly,* 397 U.S. 254 (1970); *Mathews,* 424 U.S. at 344-345. The Tribe requests only that the Secretary be directed to answer certain questions regarding the construction of the leases and the factors considered by the Director before approving the communitization agreements; the Court finds that this information can be obtained without conducting an evidentiary hearing.

However, despite the fact that an evidentiary hearing is not required upon remand, the Secretary must still consider the factors discussed above before deciding whether or not to approve communitization agreements pertaining to tribal lands. Although the Court cannot direct the Secretary to employ decision-making procedures beyond the constitutional and statutory requirements, it must determine whether the Secretary has correctly applied the law and considered the relevant factors. Remand to the Secretary is proper when he has made an error of law and failed to consider these factors. *Enterprise Association,* 429 U.S. at 522. *Asarco v. E.P.A.,* 616 F.2d at 1160.

For the reasons given above, the case is remanded to the Secretary. Upon remand, the Secretary is to answer the following questions:

I. Clause 9, Tribal Consent Issue.

(a) What was the Department of the Interior's construction of clause 9 of the leases at the time they were executed?

(b) Were there any written opinions or guidelines regarding the construction of clause 9? If so, what did they say?

(c) What was the Department's understanding of the requirement of tribal consent in 25 C.F.R. §211.21(b) at the time the leases at issue were executed? Whose responsibility was it to obtain this consent? What tribal officials were authorized to give this consent? Was it possible for a tribe to give blanket consent to all future communitization agreements? If consent was waivable, what were the requirements of a valid waiver?

(d) Were there any written guidelines or policies regarding the Department's interpretation of 25 C.F.R. §211.21(b)? If so, what did they provide?

(e) What was the Department's policy with regard to

obtaining tribal consent to communitization agreements at the time these leases were executed? Was this policy discussed in any written guidelines or opinions? If so, where?

(f) At the time the leases were executed, what evidence, if any, was there of the intent and understanding of these parties regarding clause 9 of the leases, 25 C.F.R. §211.21(b), and their effect on the Tribe's right to consent to communitization agreements?

II. Authority Issues.

(a) What evidence of the market value and marketability of new leases that could have been negotiated had the communitization agreements not been approved did the Acting Area Director consider before making his decision?

(b) On what basis did the Acting Area Director conclude that revenue lost by the Tribe as a result of de-spacing and litigation would not be offset by increased revenue from re-leasing?

(c) On what basis did the Acting Area Director conclude that communitization agreements could not be obtained after the land was re-leased if he did not approve these particular communitization agreements?

(d) Did the Acting Area Director consider his authority under 25 C.F.R. §211.21(a) to impose restrictions on drilling and production in order to protect natural resources and further the best interests of Indian lessors before he concluded that failure to approve these particular communitization agreements would lead to a depletion of mineral reserves to the detriment of all interest owners?

(e) Did the Acting Area Director consider the fact that the unit wells were located on tribal tracts? If he did, how did he reach the conclusion that a failure to approve the communitization agreements, followed by the Corporation Commission's de-spacing of tribal tracts would decrease the Tribe's net revenues?

Upon remand, this Court will retain jurisdiction over the case. *See Ford Motor Co. v. NLRB,* 305 U.S. 364, 373 (1939); *Avery v. Secretary of Health and Human Services,* 762 F.2d 158, 163 (1st Cir. 1985). The Secretary is directed to file with this Court answers to the questions listed above within 120 days.

(iv)

Finally, the Tribe has also moved for clarification of the grounds on which the Court granted summary judgment on the issue of whether the Woods leases violated the Mineral Leasing Act. This motion is denied.

Therefore it is ORDERED that plaintiff's Motion to Vacate and Remand is GRANTED in part and DENIED in part, in accordance with this decision; plaintiff's Motion for Clarification is DENIED.

DATED this 13th day of November, 1986.

WAYNE E. ALLEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

CHEYENNE ARAPAHO TRIBES OF OKLAHOMA	)	Filed March 26, 1987
Plaintiff,	)	
-vs-	)	CIV 84-1765-A
UNITED STATES OF AMERICA, et al.	)	
Defendants.	)	

RESPONSE OF UNITED STATES OF AMERICA
TO COURT'S ORDER DATED November 13 1986

COMES NOW the defendant, United States of America, by and through its attorneys, William S. Price, United States Attorney for the Western District of Oklahoma and Eleanor Darden Thompson, Assistant U.S. Attorney and in response to the Court's Order dated November 13, 1986, supplies the attached memorandum.

Respectfully Submitted,

WILLIAM S. PRICE
United States Attorney

ELEANOR DARDEN THOMPSON
Assistant U.S. Attorney

United States Department of the Interior

REC'D
MAR 26 1987
USA-WD/OK
DHL

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

In reply, please address to:
Main Interior, Room 6456

Eleanor Darden Thompson, Esq.
Assistant United States Attorney
4434 U.S. Courthouse & Federal
Office Building
Oklahoma City, Oklahoma 73102

Re: *Cheyenne-Arapaho Tribes of Oklahoma v. The United States of America, et al.*, No. Civ 84-1765-A, U.S.D.C. W.D. Okla.

Dear Ms. Thompson:

Enclosed for filing is the Department of the Interior's response to the Court's Order dated November 13, 1986. On remand to the Secretary, the Court requested the Department to respond to several questions. Attached are the Department's responses, a list of documents reflecting the development of the Bureau of Indian Affairs' communitization policy, and a summary of the present communitization policy of the Bureau of Indian Affairs. These need to be filed with the Court on March 26, 1987.

Thank you for your assistance in this matter.

Sincerely,

Thornton W. Field
Assistant Solicitor -
Branch of Land and Minerals
Division of Indian Affairs

Enclosures

CHEYENNE - ARAPAHOE TRIBES OF OKLAHOMA

v.

THE UNITED STATES OF AMERICA, et al.

I. Clause 9, Tribal Consent Issue

In order to respond to the Court's questions concerning the Tribal Consent Issue, the Deputy to the Assistant Secretary — Indian Affairs (Trust and Economic Development) by memorandum dated December 12, 1986 requested the Area Directors of each BIA Area office involved in administering the leasing of Indian lands for mineral development to respond to the Court's questions. Responses were received from Aberdeen, Albuquerque, Anadarko, Billings, Muskogee, and Phoenix Area Offices. Following is a summary of their responses.

It should be noted that administration of Indian leases in Oklahoma varies significantly from other areas because there is very little tribally owned land and mostly allotted lands. Since allotments usually contain too small an acreage to develop independently, communitization is standard practice for proper development in Oklahoma. Also, the leases used by the Anadarko Area office contain a pooling clause, such as Clause 9, unlike the Indian tribal leases in most other BIA areas.

I.(a) What was the Department of the Interior's construction of clause 9 of the leases at the time they were executed?

In our request for information from the Area Directors we asked for each Area's interpretation of Clause 9 as to tribal consent both before and after May 1981. The responses were mixed. Aberdeen, Albuquerque, Billings and Phoenix all replied that regardless of whether the lease contained language such as that of Clause 9, tribal consent was always obtained prior to approval of Communitization Agreements both before and after May 1981. Anadarko and

Muskogee both replied that their interpretation of Clause 9 was such that by signing the lease containing the language of Clause 9, the tribe or allottee had already consented to communitization.

Anadarko went on to say that prior to May 1981, lessor consent by execution of the Communitization Agreement was a policy requirement as a means of keeping mineral owners cognizant of development and of the inclusion of their interest(s) in a unit. Anadarko explained that:

> With the exception of the Cheyenne-Arapahoe tracts (Concho Agency), we do not have any tribal tracts conducive to mineral development and until the deeper drilling of gas in parts of Western Oklahoma, tribal involvement was minimal; thus interpretation of the consistency of Section 9 of the lease form and of 25 CFR section 211.21(b) had not been a problem.
>
> The Oklahoma legislature enacted its well spacing act in 1935, and our leases have been included in CAs approved by this office since the early 1950's; thus spacing, pooling, unitization, and communitization are very familiar terms in our area. Our leases have contained a pooling clause for approximately 50 years, and we currently have about 750 CAs in active status. (Each CA affects a conglomerate number of leases, both Indian and non-Indian.)

After April 1982, the signature of the mineral owner was no longer required although the company submitting the communitization agreement for approval was required to notify all the Indian mineral owners of their application for communitization. Although Anadarko preferred that the tribe give its consent, it was not required. Anadarko states that:

> The policy of requiring lessor's consent by execution of the CA has been one of long standing, and

posed no particular problem until 1981, when deep gas discovery prompted a short period of astronomical bids on our advertised mineral tracts. The small percentage of adverse reaction to approval or disapproval by lessee and/or lessor occurred mostly in 1981.

I.(b) Were there any written opinions are guidelines regarding the construction of Clause 9? If so, what did they say?

Yes. The Deputy Assistant Secretary — Indian Affairs (Operations) issued a memorandum dated April 23, 1982 stating that lessor consent is not required if it has already been granted in the lease by terms such as a Clause 9 or similar language. The Interior Board of Indian Appeals (See IBIA 82-37-A, dated February 10, 1983) affirmed the Deputy Assistant Secretary's determination that prior approval to communitize had been granted in the lease instrument. We are aware of no earlier guidance issued on this issue, and as noted in the answer to question I(a), practice was varied.

I.(c) What was the Department's understanding of the requirement of tribal consent in 25 C.F.R. 211.21(b) at the time the leases were executed? Whose responsibility was it to obtain this consent? What tribal officials were authorized to give this consent? Was it possible for a tribe to give blanket consent to all future communitization agreements? If consent was waiveable, what were the requirements of a valid waiver?

Again, mixed responses were obtained from the various Area Offices. Aberdeen, Billings and Phoenix all reported that they understood the provision of 25 C.F.R. 211.21(b) to require tribal consent to any communitization agreement prior to approval both in 1976 and 1981. Both Anadarko and Muskogee report that tribal consent is not a statutory requirement under the 1938 Mining Act (52 Stat. 348, 25 U.S.C. 396d) and that no consent to communitization has

been sought since Clause 9 of the standard oil and gas lease was considered to provide any necessary consent.

As to whose responsibility it was to obtain this consent, the responses varied significantly. Aberdeen said it should be a three party effort, agency and tribal staff and lessees. Albuquerque replied that this responsibility fell to the respective Agency Superintendents. Anadarko, Billings and Phoenix stated that the Applicant/Operator of the communitization agreement was responsible for obtaining any necessary tribal consent.

In most cases the tribal chairman is authorized by the tribal council to give the requisite consent. The Jicarilla Apache Tribe requires a Tribal Council Resolution.

Aberdeen and Phoenix reported that the Tribal Council could delegate consent to future communitization agreements by resolution. Albuquerque and Billings stated that it was not possible for a Tribe to give blanket consent to all future communitization agreements. Anadarko said that such blanket consent was not considered, probably for the reason that little tribal lands in Oklahoma are involved in oil and gas production and those that are, are generally treated individually on a case-by-case basis of necessity because of circumstances surrounding the development of the respective acreage.

As to whether or not tribal consent could be waived, Aberdeen, Anadarko and Phoenix reported that it could be waived by tribal resolution. Albuquerque said that consent was not considered waiveable and Billings stated that they have not dealt with any tribe willing to execute such a waiver.

I.(d) Were there any written guidelines or policies regarding the Department's interpretation of 25 C.F.R. § 211.21(b)? If so, what did they provide?

No written guidelines or policies have been issued pertaining specifically to the Department's interpretation of

25 C.F.R. § 211.21(b). However, enclosed is a list and accompanying documents of all Departmental opinions and guidelines (to the best of our knowledge) related to the issue of communitization.

I.(e) What was the Department's policy with regard to obtaining tribal consent to communitization at the time these leases were executed? Was this policy discussed in any written guidelines or opinions? If so, where?

Aberdeen, Albuquerque, Billings and Phoenix all understood Departmental policy as requiring Tribal consent prior to approving a communitization agreement. Anadarko and Muskogee did not require any other consent by the Tribe since the Tribe had already consented communitization by signing leases containing the language of Clause 9. Enclosed is a list and accompanying documents of all Departmental opinions and guidelines (to the best of our knowledge) related to the issue of communitization.

I.(f) At the time the leases were executed, what evidence, if any, was there of the intent and understanding of these parties regarding Clause 9 of the leases, 25 C.F.R. § 211.21(b), and their effect on the Tribe's right to consent to communitization agreements?

We were unable to locate any evidence, if any exists, as to the intent and understanding of the parties at the time the leases were executed.

II. Authority Issues

The following responses were provided by the Anadarko Area Office.

Lease History for Reference:

Lease No.	Term	Approval & Expir. Date	Bonus	Royalty Rate
Section 29:				
7672 NE/4	5 Years	2/22/80-85	$315/Ac. ($50,400)	20%
*6984 SW/4	5 Years	5/10/76-81	$ 35/Ac. ($5,721.60)	16 2/3%

UNIT WELL: NE/4, Drilling began 11/30/80.

NOTE: On fee land (NW/4 and SE/4, there were at time of CA approval, 13 leases, the first of which was obtained 8/29/77).

Section 32:				
*6986 NW/4	5 Years	5/10/76-81	$ 35/Ac. (5,721.60)	16 2/3%
7675 SW/4	5 Years	2/22/80-85	$235/Ac. ($37,600)	20%
*6985 NE/4	5 Years	5/10/76-81	$ 35/Ac. ($5,721.60)	16 2/3%
*6897 SE/4	5 Years	5/10/76-81	$ 35/Ac. ($5,721.60)	16 2/3%

UNIT WELL: NW/4, Pre-drill Inspection made 3/30/81 by BIA and BLM. Application to Drill was submitted 3/6/81 and approved by BLM 4/22/81. Site preparation began 4/22/81.

*In the absence of CA approval on 5/8/81, Lease 6894 (Section 29) and Leases 6986, 6985 and 6897 (Section 32) would have expired 5/10/81.

II.(a) What evidence of the market value and marketability of new leases that could have been negotiated had the communitization agreements not been approved did the Acting Area Director consider before making his decision?

The Acting Area Director did not consider any evidence of the market value and marketability of new leases. At the time the communitization agreements were approved, all the Indian leases were still in their primary terms. The bonus paid at the time of acquisition of an oil and gas lease constitutes compensation for the right to develop the leasehold for a specified term of years. (Total bonus for the six leases here totalled $110,886.40). There was no reason for requiring another evaluation during the primary term of a lease which provides for pooling with the Secretary's approval.

II.(b) On what basis did the Acting Area Director conclude that revenue lost by the Tribe as a result of de-spacing and litigation would not be offset by increased revenue from releasing?

Refer also to II.(a) above. Assuming the operator of the unit well (Reading and Bates) in the NE/4 Section 29 (50% Tribal land) accepted a decision disapproving communitization and the investor/lessee of the SW/4 Section 29 peaceably surrendered its lease claiming no further interest, the SW/4 could have been placed upon the next scheduled sale (Lease in NE/4 would not have expired until 1/22/85). Appraisals would have been requested at that time. Further, assuming no dry holes or other factors detrimental to development surfaced, one would have expected to receive a bonus bid in excess of the $315 and $235 per acre received for the NE/4 Section 29, and the SW/4 Section 32 in January and February of 1980. Since Section 32 is all tribal land, under the conditions cited above, a similar bonus would have been expected. However, it was the Area Office staffs' opinion, based upon experience in similar situations, that adverse reaction from the losing lessees would have resulted because of the more than four years spent in perfecting leases within the section, and the possibility that other leases would have been put in jeopardy. Potential lessees do not wish to become burdened with leases involved

in administrative or judicial litigation, or to be burdened with an obligation to pay the proportionate part of any unit well drilled or being drilled while the status of leasehold issue is in question. Neither would the Area have been able to release any bonuses to mineral owners until any dispute had been resolved. While it was not possible to formulate a definitive conclusion in either case, failure to join the unit by communitizing would have resulted in loss of several leases, and would have necessitated reforming the unit. The Area thought this would have been sufficient to promote retaliation by the losing lessee, resulting in 2 to 4 years of pursuit through legal recourse.

It was the Area's belief that no lessee would be willing to risk leasing any of the tracts that were involved in litigation or were de-spaced. Thus, the Area did not believe the Tribe would receive any increased revenues from re-leasing.

II.(c) On what basis did the Acting Area Director conclude that communitization agreements could not be obtained after the land was leased if he did not approve these particular communitization agreements?

See II.(b) above. The Acting Area Director did not believe that the tracts in dispute could have been immediately re-leased, therefore, he concluded that if the tracts weren't leased, communitization agreements could not be obtained.

II.(d) Did the Acting Area Director consider his authority under 25 C.F.R. § 211.21(a) to impose restrictions on drilling and production in order to protect natural resources and further the best interests of Indian lessors before he concluded that failure to approve these particular communitization agreements would lead to a depletion of mineral reserves to the detriment of all interest owners?

The Acting Area Director concluded that there existed valid contracts and evidence of diligent development, which, if carried to conclusion would within a reasonable time ascer-

tain if gas and/or oil were in place. In that event, the tribe would be assured of an ongoing income as opposed to the potential prospect of non-development, gamble of participation, several years of litigation and/or a combination of all. Because this conclusion was based on factors beyond the Acting Area Director's control, he did not consider his authority under 25 C.F.R. § 211.21(a) as relevant.

The Area felt it should be emphasized that at the time the communitization decision was made the Acting Area Director had to attempt to predetermine actions which might have been contemplated by lessees and other co-lessors (fee owners in Section 29) in relation to the well being drilled on tribal lease 7672, in the NE/4. In that Section, Lease 6894 (SW/4) would also have been affected by its expiration date of 5/10/81 and subject to probable controversy. In this regard, since the unit well had progressed to a depth of over 15,000, the operator may have elected to temporarily suspend operations pending the outcome of a lease sale. The latter seemed unlikely for the reason that during discussions with the tribal representatives at time of communitization they (Tribe) indicated they would only sign the CA providing they received $1,500 per acre (or $960,000) in additional bonus plus an increase in royalty. The Area could not speculate as to what an oil company would bid, whether any bids would be received, or if a bid of less than $1,500 were received, the Tribe would accept same. An estimate of value could have been available which may or may not have been consistent with values placed upon same by potential lessees and the lessors.

The fact that 19 leases (Indian and non-Indian) were involved provided an incentive for the operator to develop both areas. (Diligence in development is an important consideration in the review process and the overall assessment of time and effort spent by the lessee/operator in placing the package in position for communitization.)

After consideration of all known facts and the application of those facts to hypothetical situations, it was the Area's conclusion that the CA was in the best economic interests of the Tribe.

II.(e) Did the Acting Area Director consider the fact that the unit wells were located on tribal tracts? If he did, how did he reach the conclusion that a failure to approve the communitization agreements followed by the Corporation Commission's de-spacing of tribal tracts would decrease the Tribe's net revenues?

The Acting Area Director was aware that the unit wells were located on tribal tracts. His concern was not so much with the possibility of the Corporation Commission de-spacing the Tribal Tracts (although it was a concern), but with the possibility of the lessee choosing not to develop the tract rather than pursuing litigation. All of Section 32 is tribal, and since the unit well had not been commenced other than approval to drill and site selection, the operator may have elected the option of non-development.

We know of no way to determine with certainty whether Departmental approval or disapproval would have been the more beneficial disposition (See discussion in (d) above). Through many years of experience in the complexities of leasing, the Department has learned that few, if any, potential lessees will make a commitment involving a tract claimed by another lessee. Appeals and ensuing litigation are normally pursued by claimant lessee, the outcome of which cannot be predetermined. It has always been our position that all the clauses in a lease in good standing within its primary term are valid and deserve recognition as such. Spacing and pooling are a way of life in Oklahoma oil and gas management. The fact that pooling is almost always necessary in Oklahoma is something that lessees, lessors, etc., are aware of, particularly, in relation to leasing for and exploration of deep gas where 640 acres spacing prevails. The Anadarko

Area's leases contain what is referred to as a pooling clause. This clause permits lessors to share proportionately in all royalties from the designated unit well located within the spacing area. (Sections 29 and 32 became subject to 640-acre spacing in 1980, along with 7 other Sections in that township and range.) Lessees, therefore, when bidding on leases do so with the general knowledge that their area of interest is either spaced at 640 for deep gas, or will be, and that only one well per that area may be allowed. Lessors are also aware of this factor. Naturally, they enter into a contract in the belief that the acquired leasehold allows them to develop or to become part of a unit, and to otherwise share rights in the same reservoir.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CHEYENNE ARAPAHO TRIBES OF OKLAHOMA,	)	Filed March 27, 1987
Plaintiff,	)	
-vs-	)	CIV 84-1765-A
UNITED STATES OF AMERICA, et al.	)	
Defendants.	)	

SUPPLEMENT TO RESPONSE

COMES NOW the defendant, United States of America, by and through its attorneys, William S. Price, United States Attorney for the Western District of Oklahoma and Eleanor Darden Thompson, Assistant U.S. Attorney, and submits the "Attachment 1" to supplement the Response of the United States of America to Court's Order Dated November 13, 1986 filed herein on March 26, 1987.

WILLIAM S. PRICE
United States Attorney

ELEANOR DARDEN THOMPSON
Assistant U.S. Attorney

Summary of Present Bureau of Indian Affairs Policy Affecting Communitization Agreements

The Bureau's policy on communitization of Indian lands is contained in the Deputy Assistant Secretary (Operations) memorandum of April 23, 1982 (copy shown as Attachment No. 1). Parts of that policy statement are as follows:

The Secretary has the discretion to approve or disapprove communitization or unit agreements based on a determination of whether approval would be in the best interest of the Indian lessor. Area Directors and Superintendents must prepare such a determination in writing, based on logical engineering and economic facts, whether the agreement is approved or disapproved, and that document should be given to the applicant and the Indian lessor. In determining whether the agreement is or is not in the best interest of the Indian lessor, the following should be considered:

(a) The long term economic effects of the agreement must be in the best interest of the Indian lessor and we must be able to document these effects.

(b) The Bureau of Land Management is required to recommend approval or disapproval based upon the engineering and technical aspects of the agreement to assure protection of the interests of the Indian lessor, and BIA officials should rely on that recommendation as to the technical aspects. BIA Area Directors and/or Superintendents are delegated the authority to approve communitization agreements for Indian leases.

(c) The lessee in question must have complied with the terms of the lease in all respects, including the commencement of drilling operations, or actual drilling, or actual production in paying quantities (depending on the terms of the lease), within the unit area prior to the expiration date of any Indian lease.

(d) BIA's Central Office must approve any format of a Communitization Agreement developed by an Agency or Area Office before implementation.

(e) Applications to form Communitization Agreements should include an affidavit certifying that all Indian mineral owners have been given notice of the pending action. (BIA officials are responsible for providing operators with names and addresses of Indian mineral owners when such information is requested).

(f) The party applying for approval of a Communitization Agreement may be requested to provide copies of farmout or similar type agreements in cases where such agreements could have a bearing upon the ownership of the working interest in the unit.

On June 22, 1982, the Assistant Secretary published a notice in the Federal Register adopting these guidelines. That notice (copy shown as Attachment No. 2) requires submittal of proposed communitization agreements to the appropriate Bureau of Indian Affairs office not less than 90 days prior to the date of expiration of the first Indian lease in the proposed unit. The BLM has specifically written guidelines on reviewing and approving communitization and unit agreements for Federal lands. These are contained in the Bureau of Land Management Manual 3160.9 (Communitization) and 3180 (Unitization). Although these guidelines place emphasis on agreements involving Federal lands, they do provide some guidance for similar Indian land agreements.

The guideline and policy statement taken from the BLM's manual on communitization of Federal lands is as follows:

Guidelines and Policy (BLM's Policy for Federal Lands)

A. Justification for Approval of Communitization

Regulations and amended provisions of the Mineral

Leasing Act of 1920, which authorized communitization, are interpreted as meaning that communitization is authorized only when a Federal lease cannot be fully and independently developed in conformity with an established spacing pattern. The following will constitute sufficient justification for approval of communitization agreements.

(1) Communitization is required in order to form a drilling unit which conforms to an acceptable non-optional spacing pattern established by State order. As a general guideline, communitization will not be authorized when a single Federal lease or unleased Federal acreage can be fully developed and still conform to an optional (North-South or East-West spacing) pattern established by State order. If the Federal tract cannot be independently developed and there are a number of spacing options the authorized BLM officer should require the one which is in the best interest of the Federal Government or the Indians, i.e., the one which provides the largest Federal/Indian participation.

(2) Adequate engineering and/or geological data is presented to indicate that communitizing two or more leases or unleased Federal acreage will result in more efficient drainage of an area. As an example, justification for approval of communitization exists when sufficient control is available to generally define productive reservoir limits and communitization is necessary to confine a spacing unit within the defined reservoir limits.

(3) Communitization is required when the logical spacing for a well includes both unit and non-unit land, i.e., is located outside the unit boundary or is not committed to the unit agreement.

(4) Where, in the absence of State field or area spacing, the area has been developed by the actual drilling of at least three wells on a fixed pattern in reasonable proximity with the closest well not more than two miles distant from the proposed well location, a written statement should be required from the operator that he intends to develop his leases in the area on this pattern.

In wildcat areas that have not been developed, the authorized officer can approve the communitization of several leases or unleased Federal acreage on such reasonable basis as he deems appropriate in order to conform with general state-wide spacing for oil or gas or the spacing in a nearby pool or field which appears to be applicable; provided, however, that the Federal lease or unleased Federal acreage proposed to be included cannot be independently developed. However, it is normally preferable to wait until a well has been successfully completed in order to review the well data and consider the appropriate spacing for the reservoir prior to approval of communitization.

Note that the Area or Agency Offices have the authority to commit Indian lands to communitization agreements. Also the 1920 Mineral Leasing Act is applicable to Federal lands whereas the 1938 Mining Act (Section 396d) authorizes approval of unit and communitization agreements on Indian lands. The BIA Deputy Assistant Secretary memorandum of April 23, 1982, also discusses justifiable reasons for communitization and his instruction on that matter is quoted as follows:

"The purpose of communitization is *not* to extend the lease terms on nonproductive tracts. Its purpose is to join together two or more separately owned tracts to conform to an authorized drilling and spacing pattern associated with

the particular zone or pool. Communitization, when properly used, serves a necessary conservation function in achieving orderly development, eliminating excess drilling, and providing a means of sharing in the expenses and profits of the well."

There is no mechanism for communitizing or unitizing unleased Indian lands. There must be a lease prior to unitization or communitization and provisions of 25 CFR 211.21 specifically requires that Tribal consent be given for unitization or communitization. Regulation 25 CFR 212.24 (Allotted lands) does not require the consent of land owners prior to unitization or communitization. The Deputy Assistant Secretary requires that those mineral owners be given notice prior to finalizing such agreements. Most Allotted and Tribal leases contain a clause which is often referred to as a pooling clause which is typically worded as follows:

"The parties hereto agree to subscribe and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority of operating interest therein and approved by the Secretary of the Interior, during the period of supervision."

The Deputy Assistant Secretary's April 23, 1982, memorandum advises that the above statement or similar language grants authority to unitize or communitize without further lessor consent. The Interior Board of Indian Appeals recently affirmed (see IBIA 82-37-A, dated February 10, 1983) the Deputy Assistant Secretary's determination that the above language in a lease *constitutes* prior approval to communitize. We do emphasis that although a lease term may grant consent to unitize or communitize, it does not negate or waive required considerations iterated in the Deputy Assistant Secretary memorandum of April 23, 1982.

Appeals and litigation have resulted from Bureau of Indian Affairs approval and disapproval of communitization. In the case of Kenai v. Watt, the court upheld the Uintah and Ouray Agency Superintendents decision to deny approval to communitize. In the case of Sanguine, Ltd v. U.S. Department of Interior the court prohibited the use of new communitization forms for leases held by Sanguine, Ltd. The new form would have effectively segregated producing horizons and allowed for release of non-producing formations after the primary term of a lease had expired. The Tenth Circuit Court of Appeals reopened this case and the District Court, Western District of Oklahoma, has remanded the case to the Secretary for further proceeding. Several other cases involving communitization issues are presently pending before the District Court, Western District of Oklahoma.

The Bureau of Indian Affair's policy now requires Central Office approval of all new communitization agreement forms. Existing communitization agreement forms currently in use by various BIA offices are as follows: (Attachment No. 3) (Also refer to Attachment No. 4 for a summary of oil and gas leases presently being utilized by the various offices of the Bureau of Indian Affairs.)

Standard Federal Communitization Agreement	This form is used by most BIA offices outside of the Anadarko and Phoenix Area Offices. Generally, this form is modified to reflect unique situations which may affect a particular Tribal or allotted lease.
Anadarko Area Office Communitization Agreement Form AAO - 81 (Tribal & Allotted)	This form is applicable to Western Oklahoma

Phoenix Area Office	-	This form is applicable
Communitization	-	to the Uintah and
Agreement	-	Ouray Reservation.
Forms 5-154h or 5-5432	-	

Other disputes over communitization have resulted in appeals from both the lessor and lessee. During 1982, the Anadarko Area Office received one appeal from an Allotted land owner and one from a Tribe which protested approval of communitization agreements. At least one appeal was also received from a lessee as a result of an agency's denial of approval to communitize. The basis of most appeals filed against communitization by Indian mineral owners is that communitization will, if a producing well is drilled in the communitized area, extend lease(s) and preclude obtaining the bonus and possibly higher royalty rate that might be received from issuance of a new lease. Conversly most lessee's generally argue that pooling clauses grant authority to communitize, that communitization is required by State law, and failure to approve communitization so that land owners might receive additional bonuses for a new lease constitutes unlawful taking of property.

Experience has shown that most lessees do oppose or reject demands for additional payments in return for communitization approvals.

In summary, the potential for disputes related to denial or approval of communitization agreements exists and the documentation of actions and reasoning related to approval or disapproval of such agreements is imperative.

ATTACHMENT 1

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Energy and Mineral
Resources
Memorandum

April 23, 1982

To: All Area Directors

From: Deputy Assistant Secretary - Indian Affairs (Operation)

Subject: Approval of Communitization Agreements for Indian Oil and Gas Leases

We are experiencing an increasing amount of litigation over the BIA's exercise of its authority to approve Communitization Agreements affecting Indian oil and gas leases. However, the recent decision of the 10th Circuit Court of Appeals in *Kenai v. Department of the Interior* provides us with some guidance on the scope of that authority. Therefore, the following guidelines have been developed to assist Area Directors and Superintendents in exercising this authority.

1) Lessor consent is not required if it has already been granted in the lease terms by the following or similar language.

> "The parties hereto agree to subscribe and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority of operating interest therein and approved by the Secretary of the Interior, during the period of supervision."

2) The Secretary has the discretion to approve or disap-

prove Communitization or Unit Agreements based on a determination of whether approval would be in the best interests of the Indian lessor. Area Directors and Superintendents must prepare such a determination in writing, based on logical engineering and economic facts, whether the agreement is approved or disapproved, and that document should be given to the applicant and the Indian lessor. In determining whether the agreement is or is not in the best interest of the Indian lessor, the following should be considered:

a) The long term economic effects of the agreement must be in the best interest of the Indian lessor and we must be able to document these effects.

b) The Minerals Management Service is required to recommend approval or disapproval based upon the engineering and technical aspects of the agreement to assure protection of the interests of the Indian lessor, and BIA officials should rely on that recommendation.

c) The lessee in question must have complied with the terms of the lease in all respects, including the commencement of drilling operations, or actual drilling, or actual production in paying quantities (depending on the terms of the lease), within the unit area prior to the expiration date of any Indian lease.

d) Central Office must approve any format of a Communitization Agreement developed by an Agency or Area Office before implementation.

e) Applications to form Communitization Agreements should include an affidavit certifying that all Indian mineral owners have been given notice of the pending action. (BIA officials are responsible for providing operators with names and addresses of Indian mineral owners when such information is requested).

f) The party applying for approval of a Communitization Agreement may be requested to provide copies of farmout or similar type agreements in cases where such agreements could have a bearing upon the ownership of the working interest in the unit.

As a corrective measure, we have concluded that the BIA shall immediately publish a Notice to Indian Lessees in the *Federal Register* stating that in order to receive adequate consideration, all future Communitization agreements should be submitted not less than 90 days prior to the date of expiration of the first Indian lease within the proposed unit. Rulemaking, if needed to bring the regulations into compliance with this notice, will be promulgated by this office.

The purpose of communitization is *not* to extend the lease terms on nonproductive tracts. Its purpose is to join together two or more separately owned tracts to conform to an authorized drilling and spacing pattern associated with the particular zone or pool. Communitization, when properly used, serves a necessary conservation function in achieving orderly development, eliminating excess drilling, and providing a means of sharing in the expenses and profits of the well.

All BIA officers charged with approving or disapproving Communitization Agreements are encouraged to utilize the technical and professional services of the MMS, the BIA Division of Energy and Mineral Resources, Lakewood, Colorado, and all other available sources in arriving at their decision.

This memorandum supersedes our prior correspondence concerning this subject dated August 18, 1981.

If these guidelines do not satisfactorily resolve problems which have arisen in the process of approval of communitization agreements, it is our intention to engage in public rulemaking toward this end.

s/ John W. Fitz

CHEYENNE & ARAPAHO TRIBES OF WESTERN OKLAHOMA

v.

DEPUTY ASS'T SECRETARY - INDIAN AFFAIRS (OPERATIONS), READING & BATES PETROLEUM CO., & WOODS PETROLEUM CORP. (ON RECONSIDERATION)

12 IBIA 241 Decided *May 18, 1984*

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

The Cheyenne and Arapaho Tribes of Western Oklahoma (appellants) have filed a petition for review of the February 10, 1983, decision of the Board of Indian Appeals (Board) in *Cheyenne and Arapaho Tribes of Western Oklahoma* v. *Deputy Assistant Secretary - Indian Affairs (Operations), Reading & Bates Petroleum Co., and Woods Petroleum Corp.*, 11 IBIA 54, 90 I.D. 61 (1983). For the reasons discussed below, the Board affirms that decision as modified in this opinion.

Background

The background of this case is fully set forth in the Board's original decisior , 11 IBIA at 55-57, 90 I.D. at 61-62. That discussion is hereby incorporated by reference.

In summary, Reading & Bates Petroleum Co. and Woods Petroleum Corp. (companies) entered into 5-year oil and gas leases in 1976 with appellants. The leases covered restricted Indian lands in Custer County, Oklahoma, owned by appellants. In July 1980, the companies received pooling

orders covering these leases from the Oklahoma Corporation Commission (Commission). When the oldest of the leases was nearing its expiration date, the companies requested the Bureau of Indian Affairs (BIA) to approve a communitization agreement. The agreement would put into effect the pooling order received from the State agency. Over appellants' objections that the agreement was not sufficiently lucrative, the companies, on May 5, 1981, presented the proposed agreement to the Geological Survey for approval, pursuant to Departmental regulations. The Geological Survey recommended approval of the agreement the same day. The agreement was subsequently approved by the Concho Agency, BIA, on May 6, 1981; by the Anadarko Area Office on May 8, 1981;[1] and by the Deputy Assistant Secretary - Indian Affairs (Operations) (Deputy Assistant Secretary) on February 9, 1982. The Board affirmed approval on February 10, 1983.

Appellants sought reconsideration of the Board's decision. Initial briefs on whether reconsideration should be granted were filed by appellants and the companies. By order dated September 2, 1983, the Board granted reconsideration and requested additional information from BIA on the factors that were considered before the communitization agreement was approved. An additional briefing period followed BIA's response.

Discussion and Conclusions

The issue before the Board in this reconsideration is whether BIA improperly approved the present communitiza-

[1] Appellants argue that the speed with which the agreement was approved proves that it was not fully and carefully considered. The record, however, shows that the proposed agreement had been under discussion for a considerable time before it was actually submitted to the Department.

tion agreement without considering the economic impact of approval on the tribe.[2] The BIA's right and obligation to consider the economic best interests of an Indian lessor before approving communitization agreements was addressed by the Tenth Circuit Court of Appeals in *Kenai Oil & Gas, Inc.* v. *Department of the Interior*, 671 F.2d 383 (10th Cir. 1982). In *Kenai*, a BIA decision not to approve a communitization agreement that it believed was not in the Indians' best economic interest was challenged on the grounds that this was not a permissible reason for disapproval. The court upheld BIA, holding that its fiduciary obligation as trustee included the responsibility to determine whether such agreements were in the Indians' best economic interest. *Kenai, supra* at 387.

Following the decision in *Kenai*, the Department published guidelines for assisting BIA area directors in considering proposed communitization agreements and in ensuring adequate documentation of their analysis of all relevant factors. Memorandum of April 23, 1982 (Guidelines), adopted in 47 FR 26920 (June 22, 1982). In general, the guidelines require BIA to demonstrate that the agreement is "based on logical engineering and economic facts" (Guidelines, § 2). Section 2(a), which relates to the analysis of economic effects, states: "The long term economic effects of the agreement must be in the best interest of the Indian lessor and we must be able to document these effects."

The posture of this case, therefore, is that the decision in question was made by BIA in accordance with the requirements in effect at the time. During the pendency of an appeal

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[2] The companies initially opposed the petition for reconsideration on the grounds that it was not timely filed. The Board addressed this argument in its Sept. 2, 1983, order granting reconsideration. The return receipt card for appellants' copy of the Board's decision and the postmark on their petition for reconsideration show that the petition was timely under 43 CFR 4.315 and 4.310(a).

of that decision, the requirements were elaborated and made stricter. Although a record had been developed in the initial decisionmaking process, it was not sufficient to permit full review of the decisionmaking process as contemplated under the new requirements.

This situation is very similar to that before the Supreme Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), in which statutory and regulatory changes were made during the lengthy process of deciding on the location for a Federal-aid highway. New regulations, promulgated after the location decision was made, required the Secretary of Transportation to make "formal findings" when he approved the use of parklands for highway construction. The adequacy of the administrative record was challenged on the grounds that this regulation required the Secretary to hold hearings on the proposed location, which he had not done.

The Court agreed that it should apply the new regulation because it was "the law in effect at the time of [its] decision," 401 U.S. at 419, but refused to remand the case to the agency for a hearing to develop formal findings. The Court distinguished *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969), cited by appellants as requiring remand to the deciding agency, on the grounds that in *Overton Park* there had been a change in circumstances and an administrative record was available, although that record might not present a sufficient basis for full review of the agency decision.[3] The Court stated:

> But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the

[3] In *Thorpe*, the housing authority had refused to give a tenant any reason for her eviction.

> Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

401 U.S. at 420. The Court discouraged probing the mental processes of deciding officials if the information necessary for reveiw could be obtained in another way, recognizing that any such explanation would "to some extent, be a *'post hoc* rationalization' [which] must be viewed critically," *Id.* The procedure of requiring supplementation of the record was, however, sanctioned.[4]

Similarly, in *Camp* v. *Pitts*, U.S. 138, 142-43 (1973), the Court remanded a decision of the Comptroller of the Currency for further explanation, stating:

> If, as the Court of Appeals held and as the Comptroller does not now contest, there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a *de novo* hearing but, as contemplated by *Overton Park*, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.

The Court further noted that a reason for the agency action had been given at the time of the decision and that further elaboration must support that original reason.

In accordance with these precedents, when the Board determined that reconsideration of this appeal was appropriate and found that the administrative record

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[4] In his concurrence in *Overton Park*, Mr. Justice Blackmun noted that the new requirements "cut across former methods and * * * imposed new standards and conditions upon a situation that already was largely developed. This undoubtedly is why the record is sketchy and less than one would expect if the project were one which had been instituted after" the new requirements were announced. 401 U.S. at 423 (Blackmun, J., concurring).

provided some indication that the economic effects of approval of the proposed communitization agreement had been considered, but that the record was insufficient for full review of that issue, it requested additional information from BIA. This supplementation was provided on October 25, 1983.[5]

In order to comply with the present guidelines, the administrative record as supplemented must show that BIA determined that the "long term economic effects of the [communitization] agreement [were] in the best interest of"

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[5] The Board takes official notice that the Deputy Assistant Secretary has followed a similar procedure on at least one occasion. A Nov. 9, 1983, letter to the Board from the Deputy Assistant Secretary in *Rose* v. *Anadarko Area Director*, Docket No. IBIA 83-45-A, dismissed because of Secretarial assumption of jurisdiction, 12 IBIA 130 (1984), stated:

"This is in response to an order of the Board, dated October 19, 1983, requesting the Bureau to submit a report on the status of an administrative appeal to the Deputy Assistant Secretary-Indian Affairs (Operations) seeking review of a February 11, 1982 decision by the Anadarko Area Director, BIA, which approved a communitization agreement involving the Appellants' property.

"By way of background, on May 2, 1983, I remanded this matter to the Anadarko Area Director and directed him to prepare and submit an analysis showing whether approval or disapproval of the unit agreement was in the best economic interest of the Indian allottees. This action was taken because of the holding in *Kenai Oil and Gas* v. *Dept. of the Interior*, [671] F.2d 383 (10th Cir., February 17, 1982), which appears to require that such an analysis should be made before a communitization agreement is approved."

In *Rose*, as in the present case, the Area Director had approved the communitization agreement before the Tenth Circuit issued its decision in *Kenai*. The Deputy Assistant Secretary remanded *Rose* for supplementation of the administrative record on May 2, 1983. In *Cheyenne and Arapaho*, the decision of the Deputy Assistant Secretary upholding the Area Director's initial decision without further elaboration had been issued on Feb. 9, 1982, before the new guidelines were published in the *Federal Register* on June 22, 1982.

appellants (Guidelines, § 2). The original record shows that BIA expended considerable effort in 1981 to revise its standard communitization agreement form in order to provide more favorable terms for Indian lessors. Among other things, the revised form was designed to provide in general what BIA believed to be the most favorable economic terms for Indian lessors. The agreement here was submitted using the revised form.

The BIA's supplementation further shows that the long-term economic effects of the proposed agreement where considered. The BIA states that it was primarly concerned with the possibility that if communitization was not approved, the Commission would de-space the Indian allotments from its pooling order. The BIA believed that de-spacing would substantially hinder the issuance of new leases on the tracts when the existing leases expired because of production from the remaining portions of the pooled area and probable litigation or other controversy concerning the tracts. The BIA states:

> The assertions of the appeal are that new leases *might* have been negotiated if the agreements had not been signed. There is also a possibility that the three (3) leases that would have expired, absent the communtization approvals, could not have been leased again.
>
> A consideration given by the Area Office which was not contemplated in the appeal was the authority of the Oklahoma Corporation Commission to de-space lands from spacing units established by them. De-spacing essentially allows an operator, in an area spaced by the Commission, to produce and *not* distribute revenues to de-spaced interest owners in the spaced area. [6] [Italics in original.]

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[6] Memorandum from Program Officer, Division of Energy & Mineral Resources, Golden, Colorado, to Solicitor's Office, May 5, 1983 (May memorandum), at 4. The memorandum then describes the effect of such de-spacing upon another Oklahoma Indian tract.

The Acting Anadarko Area Director (Acting Area Director) further elaborates on the potential effect of disapproval of communitization agreements:

> Experience with other Indian mineral ownerships wishing to be removed from CAs [communitization agreements] until another bonus might be obtained, result in cases where the oil companies have petitioned the State Corporation Commission to remove the tracts from the spacing unit, or by total abandonment by the oil companies of development of the Section. There are instances where an oil company and/or investor within the spacing area is willing to proceed with development and carry an unleased Indian tract, providing it is very small. Most, however, are reluctant to carry an unleased tract of any size because of the costs involved in drilling the spacing pattern, whether voluntarily or involuntarily, it is not likely that an oil company would be interested in drilling the second well, when it has been determined that the common source of supply may be drained by one well.[7].

Furthermore,

> If proper reservoir spacing were not followed, the reservoir would be developed under the simple rule of capture. This has a long-term result of lower ultimate recovery of oil and/or gas (to the detriment of all interests). There may be times when spacing is not in the best interests of a particular individual in the short-term; but, the determination to communitize must be based upon the long-term overall conditions of the reservoir.[8]

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[7] Memorandum from Acting Area Director, Anadarko Area Office, BIA, to Solicitor's Office, Oct. 3, 1983 (October memorandum), at 4.

[8] October memorandum at 2-3.

In contrasting the short-term versus long-term economic effects of approval of this communitization agreement, the Acting Area Director notes:

> Approval or disapproval of CAs has always been the subject of a thorough review. Most objections or concerns posed by Indian mineral owners were prompted by the short-lived astronomical bonuses received for leases within the Anadarko Basin, and the hope that they might avail themselves of such a bonus. In general, object to communitization, per se, is not the prevailing concern, but rather, that where the end of the primary term is in sight, that expiration thereof may occur, and a new lease may result in another (and substantially large) bonus. Therefore, the official having the responsibility of approving proposed CAs must weigh all factors in reaching a decision which will benefit the Indian mineral ownership. The purpose of communitization is not to extend lease terms, but to achieve orderly development and to encourage timely development.[9]

After analyzing potential economic effects of approval, BIA concludes:

> We are of the opinion that a uniform policy of refusing to approve communitization agreements in logically spaced areas solely for the reasons that the mineral owners *might* receive additional revenues will eventually diminish the sale of Indian land leases and will not be in the best long term interests of the Indians [10] [Italics in original.]

Appellants contend that this analysis is legally incorrect because a state has no jurisdiction over the communitization of Indian tracts. *Samedan Oil Corp.* v. *Cotton*

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[9] October memorandum at 4.

[10] May memorandum at 4.

Petroleum Corp., 466 F.Supp. 521, 526 (W.D. Okla. 1978). The BIA's submissions agree that states have no jurisdiction over Indian tracts. *See, e.g.,* October memorandum at 2: "Since the State Commission cannot pool Indian Lands into an established spacing unit, joinder of the Indian tract(s) is achieved by a CA approved by the Secretary under terms of the lease."

Appellants attempt to take this legal principle further by apparently alleging that because the State does not have authority to join Indian tracts, it also does not have authority to de-space such tracts. The question here is not the possible effect of a state order attempting to de-space Indian tracts from a pooling order put into effect by the Secretary through approval of a communitization agreement. Rather, the question is whether a state has the authority to de-space tracts when the Secretary has refused to approve communitization. De-spacing under such circumstances is the ultimate recognition by the state that it does not have the authority to force the inclusion of Indian tracts in a pooling order without Secretarial approval. Because none of the cases cited by appellants requires a different conclusion, the Board finds that BIA's assertion that failure to approve a communitization agreement might result in the de-spacing of an Indian tract is not without foundation.

Through its supplementation of the record. BIA has shown that it considered the long-term economic best interests of appellants in approving the communitization agreement at issue. Although appellants disagree with BIA's analysis and with particular provisions of the agreement, and believe that a more immediately lucrative agreement might have been reached, it was within BIA's discretion to approve an agreement as long as it considered the relevant factors, including the Indian lessor's long-term economic best interests. The Board has jurisdiction only to determine whether BIA considered the relevant factors in approving

the communitization agreement. Because BIA has shown that it did consider appellants' long-term economic best interests, the only factor contested by appellants, the Board has no further jurisdiction in this case and cannot second-guess BIA's exercise of discretion to approve the communitization agreement.[11]

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's February 10, 1983, decision is affirmed as modified in this opinion.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

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[11] *Cf. Overton Park, supra* at 416:

"The court is not empowered to substitute its judgment for that of the agency."

UNITED STATES DEPARTMENT OF THE INTERIOR
Office of Hearings and Appeals
Interior Board of Indian Appeals

	Filed
CHEYENNE AND ARAPAHO TRIBE OF WESTERN OKLAHOMA	October 25, 1983
	)Docket
v.	)No.
	)IBIA
DEPUTY ASSISTANT SECRETARY - INDIAN AFFAIRS (OPERATIONS) READING & BATES PETROLEUM CO., AND WOODS PETROLEUM CORP.	)82-37-A

RESPONSE OF GOVERNMENT APPELLEE

In response to the Board's order of September 2, 1983, directing the Appellee to supplement the record to show what factors were considered in approving the communitization agreement at issue in this case, the Appellee submits for the Board's consideration Exhibit A, a report prepared by the present Acting Area Director, Anadarko Area, Bureau of Indian Affairs, on October 3, 1983.

In addition, submitted as Exhibit B is a report of the Programs Officer, BIA, Division of Energy and Mineral Resources, dated May 5, 1983, pertaining to the Appellants' petition for rehearing. This report draws attention to the fact the determination of the economic effects of approval or disapproval of communizations agreements in Oklahoma must take into consideration the possibility that operators may receive approval of applications filed with the Oklahoma Corporation Commission to de-space lands from approved spacing unit. De-spacing, if approved, allows the operator to produce in the unit area and not distribute revenues to the de-spaced owners.

The report shows why the Oklahoma Corporation Commission might give its approval of an application to despace the Appellants' tracts based upon the pertinent facts and circumstances. The Appellant also wishes to call attention to the fact that, although Exhibits A and B are not contemporary reports prepared at the time the Area Director made his decision to approve the unit agreements on May 8, 1981, nonetheless they are analyses by the Bureau's experts and accordingly should be given the full consideration normally afforded agency experts by reviewing authorities. Also, consideration should be given to the fact that the Area Director's decision predated the Tenth Circuit's decision in *Kenai*, announced on February 17, 1982, by nearly a year, and instructions implementing that decision to the effect that superintendents and Area Directors are to prepare a written analysis of whether approval of a proposed unit agreement was in the best economic interest of the Indian owner were not issued by the Appellee until April 22, 1982. Consequently, the Board is urged to give little weight to any argument that Exhibits A and B must be disregarded because they are not analyses prepared at the time the Area Director rendered his decision.

Respectfully submitted,

Counsel for the Assistant
Secretary - Indian Affairs
(Operations)

EXHIBIT A

UNITED STATES GOVERNMENT MEMORANDUM

Date: Oct. 3, 1983

Reply To Attn Of: Area Director, Anadarko Area

Subject: Appeal by Cheyenne-Arapaho Tribes of Oklahoma, from decision of the Acting Anadarko Area Director to approve two Communitization Agreements (CAs) on May 8, 1981, covering tribal lands in Secs. 29/32-T14N-R20W

To: Associate Solicitor - Indian Affairs
Attn: Jack Martin

This is in response to your Memorandum of September 13, 1983, wherein a request is made for a written determination of the analysis made prior to May 8, 1981, to determine whether approval or disapproval of subject CAs was in the best interests of the Indian allottees. For reference, basics concerning the leases involved and included in the agreements are cited below:

Communitized Tribal Leases
(CA Approved 5/8/81)

Lease No.	Term	Expiration Date & Current Status	Bonus Rec'd	Total Bonus	Royalty Rate
Section 29 - 14N-20W					
19-20-205-7672, 160 Ac., NE¼	5 Yrs.	02/22/85 Producing well on lease	$315/Ac.	$50,400.00	20%
14-20-205-6894, 160 Ac., SW¼	5 Yrs.	05/10/81 Held by Production (HBP) from Lease No. 14-20-205-7672	$ 35/Ac.	5,721.60	16⅔%

Lease No.	Term	Expiration Date & Current Status	Bonus Rec'd	Total Bonus	Royalty Rate
Section 32 - 14N-20W					
14-20-205-6896, 160 Ac., NW¼	5 Yrs.	05/10/81 HBP from well on lease	$ 35/Ac.	5,721.60	16⅔%
14-20-205-7675, 160 Ac., SW¼	5 Yrs.	02/22/85	$235/Ac.	37,600.00	20%
14-20-205-6895, 160 Ac., NE¼	5 Yrs.	05/10/81 Held by Communitized Production	$ 35/Ac.	5,721.60	16⅔%
14-20-205-6897, 160 Ac., SE¼	5 Yrs.	05/10/81 Held by Communitized Production	$ 35/Ac.	5,721.60	16⅔%

(BIA) Lease Form AAO-71 provides under Sec. 9 . . . . "Unit Operation. — The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision."

STATEMENT OF THE FACTS CONSIDERED PRIOR TO APPROVAL OF CAs ON MAY 8, 1981

That: 7-17-80 Oklahoma State Corporation Commission established 640 acre gas spacing 8 units per Order #171780, providing for the drilling of one well per section, to the common source of supply;

4-1976	Leasing began in both sections, continuing through 6-1980 in Sec. 29, and through 2-1980 in Sec. 32.
11-30-80	Drilling operations commenced, in NE/4 Sec. 29 (Lease #7672)
5-6-1981	Drilling operations commenced in NW/4 Sec. 32 (Lease #6896)
5-6-1981	USGS (now BLM), Tulsa, Oklahoma, transmitted CAs for Secs. 29 and 32, to Superintendent, Concho Agency.

A review by USGS (now BLM) considered the following factors and concluded that the spacing area provided the Indian mineral owners with the optimum participation possible and offered the best ultimate recovery.

"State conservation for oil and gas commissions establish well spacing requirements applicable to Federal and Indian Lands when acceptable to MMS. The commissions hold hearings and secure testimony from expert witnesses as to the best well spacing for the reservoir using known or available geological and engineering data. Since the State Commission cannot pool Indian lands into an established spacing unit, joinder of the Indian tract(s) is achieved by a CA approved by the Secretary under terms of the lease. If proper reservoir spacing were not followed, the reservoir would be developed under the simple rule of capture. This has a long-term result of lower ultimate recovery of oil and/or gas (to the detriment of all interests). There may be times when spacing is not in the best interests of a particular individual in the short-term; but, the determination to communitize must be based upon the long-term overall conditions of the reservoir."

5-6-1981	Concho Agency transmitted CAs to Area Office recommending approval.

That: If disapproved, operator/lessee might elect to seek relief through the administrative procedure or through the courts, or both;

Experience has shown that most lessees oppose or reject demands for additional payments in return for CA approvals, contending the existing lease contract continues all leasehold rights while in the primary term.

The bonus consideration received from the six leases in 1967 and 1980, aggregating $110,886.40 for the 960 acres was an adequate and beneficial return from the mineral resource. Leasing year 1976 was prior to the boom occurring in 1980-81 and the bonuses being received were in keeping with the market demand at that time. The royalty rate was increased to 20% in 1978. The two leases cited above that were approved in 1980, were in favor of Reading and Bates. The others, were originally leased to Woods Oil. The non-Indian acreage (320 acres) in Section 29 is held by other lessees.

Litigation or appeal procedures initiated by Operator/Lessee could preclude development of the unit well and/or interest by others in leasing of tracts expiring during the pendency of said actions. Because of the large mineral ownership in both sections, the Tribe's best interest would not appear to be realized upon pursuit of either alternative.

4-22-81 Application for Permit to Drill approved for Section 32

5-6-81 Well spudded in Section 32

5-8-81 Drilling at depth of 1,684 feet in Section 32

5-10-81 Operator drilling at 15,073 feet on Lease 7672 in Section 29

CONCLUSION

That: The CAs had been received prior to expiration of the Indian leases and that commencement of drilling operations within the unit area was within the primary terms.

The 4-year leasing efforts (76-80) indicate diligent effort in development of Sections 29 and 32 by Operator/Lessee.

The primary purpose for leasing constitutes an agreement between lessor(s) and lessee(s) whereby the ultimate goal is production through a joint effort. Commencement of the unit wells indicated probability of achievement. (Note that depth of the well in Section 29 on Indian lease 7672 was over 15,000 feet, two days after Agreements were approved.)

Experience with other Indian mineral ownerships wishing to be removed from CAs until another bonus might be obtained, result in cases where the oil companies have petitioned the State Corporation Commission to remove the tracts from the spacing unit, or by total abandonment by the oil companies of development of the Section. There are instances where an oil company and/or investor within the spacing area is willing to proceed with development and carry an unleased Indian tract, providing it is very small. Most, however, are reluctant to carry an unleased tract of any size because of the costs involved drilling the spacing pattern, whether voluntarily or involuntarily, it is not likely that an oil company would be interested in drilling the second well, when it has been determined that the common source of supply may be drained by one well.

GENERAL DISCUSSION

Approval or disapproval of CAs has always been the subject of a thorough review. Most objections or concerns

posed by Indian mineral owners were prompted by the short-lived astronomical bonuses received for leases within the Anadarko Basin, and the hope that they might avail themselves of such a bonus. In general, objection to communitization, per se, is not the prevailing concern, but rather, that where the end of the primary term is in sight, that expiration thereof may occur, and a new lease may result in another (and substantially large) bonus. Therefore, the official having the responsibility of approving proposed CAs must weigh all factors in reaching a decision which will benefit the Indian mineral ownership. The purpose of communitization is not to extend lease terms, but to achieve orderly development and to encourage timely development.

Had the leases (those approved in 1976) been permitted to expire, it is conceivable that they would have become the subject of controversy, rendering them incapable of advertisement pending outcome thereof.

DECISION

We consider that the CAs were given a thorough review from engineering and legal standpoints, and in addition, all pertinent economic factors were considered in arriving at the conclusion that approval of the CAs covering all of Section 32 and half of Section 29 was in the best long-term interest of the Tribe. Historically, the initial decision appears to have been even more prudent in light of the completion of the two producing wells.

In our judgment, the assessment made from the facts and conclusions specifically set out herein, was supportive of the decision to approve the agreements, i.e., that the CAs were timely filed; diligent development of the section by leasing effort and by actual commencement of the unit wells was evident, spacing appeared proper; and that failure to approve may have deferred and/or prohibited exploration. Additionally, much credence was placed upon the evalua-

tions and recommendations made by USGS and by the Concho Agency Superintendent.

Accordingly, the Agreements were approved by the Acting Area Director on May 8, 1981.

Respectfully submitted is a supplement report as permitted by "Order Granting Reconsideration and Establishing Procedures".

Area Director

Attachment

EXHIBIT B

UNITED STATES GOVERNMENT MEMORANDUM

Date: May 5, 1983

Reply To Attn Of: Programs Officer, Division Energy & Mineral Resources, Golden, CO

Subject: Cheyenne-Arapaho Tribes Petition for rehearing before IBIA

To: Jack Martin, Solicitors Office

We have received your request for a response to the Cheyenne-Arapaho Tribes petition for a rehearing of the issues involved in IBIA 82-37-A.

A reiteration of the events related to the Tribes petition for rehearing is as follows. On May 8, 1981, the Acting Anadarko Area Director approved two (2) agreements communitizing Tribal lands in sections 29 and 32, T-14N, R-20W, Custer County, Oklahoma. The agreements communitized two (2) 160 acre tracts of Tribal lands with two (2) 160 tracts of fee land in section 29 and communitized four (4) 160 acre tracts of Tribal land in section 32. The purpose of the agreements was to form two (2) 640 acre gas well spacing units to conform with the spacing units established by Oklahoma Corporation Commission Order No. 171780, dated July 17, 1980. Both communitized areas now contain gas wells which are producing from the Red Fork Formation. The attached plat show the leases within the communitized sections and the locations of wells. Drilling operations commenced in section 29 on November 30, 1980 and in section 32 on May 6, 1981. The following tabulation provides a detail summary on the communitized Tribal leases in the two (2) sections:

Communitized Tribal Leases

Lease No.	Term	Normal Expiration Date & Current Status	Bonus Received	Royalty Rate
Section 29				
19-20-205-7672	5 years	01/22/85 Producing well on lease	$315/acre	20 percent
14-20-205-6894	5 years	05/10/81 Held by production (HBP) from lease No. 14-20-205-7672	$35/acre	16 2/3 percent
Section 32				
14-20-205-6896	5 years	05/10/81 HBP from well on lease	$35/acre	16 2/3 percent
14-20-205-7675	5 years	02/22/85	$235/acre	20 percent
14-20-205-6895	5 years	05/10/81 Held by communitized production	$35/acre	16 2/3 percent
14-20-205-6897	5 years	05/10/81 Held by communitized production	$35/acre	16 2/3 percent

In the absence of the communitization agreement approvals, dated May 8, 1981, Lease No. 14-20-205-6894 (section 29) and Lease Nos. 14-20-205-6895 and 14-20-205-6897 (section 32) would have expired May 10, 1981.

On February 10, 1983, the Interior Board of Indian Appeals (IBIA-82-37-A) affirmed the Deputy Assistant Secretary's decision to uphold the Acting Area Director's approval of the communitization agreements. In concurring with the decision IBIA's Chief Administrative Judge Horton held that the appellants failed to show approval of the communitization agreements was not in the best interest of the Tribes. In another opinion Administrative Judge Muskrat concluded that the case should be remanded to the BIA for action con-

sistent with trust responsibilities as defined by the Tenth Circuit Court in *Kenai* and by the Bureau itself in its guidelines and policy pronouncement. Judge Muskrat acknowledged that the Kenai case and the issuance of written Bureau policy statements postdated the Deputy Assistant Secretary's denial of the Tribes appeal against approval of the agreements.

Following the decision rendered in IBIA 82-37-A the Tribes attorneys filed a petition for rehearing. The petition alleges that the BIA failed to consider the economic impact on the Tribes before approval of the two (2) communitization agreements. A section of the petition is quoted as follows:

> "Since the BIA has not made, and we submit cannot make a showing that it considered the economic impact which its approval of the the communitization agreement would have on the Tribes lease revenue *before* approving the agreement, the Board should find that the BIA ignored a trust duty in approving the agreements; and void the approval."

A memorandum, dated October 21, 1981, from the Anadarko Area Director to the Deputy Assistant Secretary (Operations) states in part:

> "It is our position that approval of the Agreements was pursuant to 25 U.S.C.A. § 396d . . . that the best interest of the Tribes was a consideration and that there was no defendable reason for rejecting approval thereof."

The Tribes were seeking payment of $1,500.00 per acre and a 5 percent carried working interest and a royalty interest for the 960 acres of Tribal lands in the communitized areas. Other statements within the appeal indicating possible renumerations sought by the Tribes are quoted as follows:

> "Approval of the communitization agreements also

> prevented the tribe from negotiating a joint venture agreement on oil and gas development on the unit leases which would have increased tribal control over its resources and financial independence in the spirit of the federal vision after the IRA . . . . . Had the Woods leases been permitted to expire, the Tribes might have negotiated new oil and gas leases providing for the renegotiation upon unitization."

The assertions of the appeal are that new leases *might* have been negotiated if the agreements had not been signed. There is also a possibility that the three (3) leases that would have expired, absent the communitization approvals, could not have been leased again.

A consideration given by the Area Office which was not contemplated in the appeal was the authority of the Oklahoma Corporation Commission to de-space lands from spacing units established by them. De-spacing essentially allows an operator, in an area spaced by the Commission, to produce and *not* distribute revenues to de-spaced interest owners in the spaced area.

The BLM's Tulsa office has provided an example of the results of de-spacing. The SE¼ of Section 14, T-9N, R-9W, Caddo County, Oklahoma, is the Lydia Penn, Caddo Allotment No. 684, which was de-spaced by the Oklahoma Corporation Commission under Order No. 167239. The reason for de-spacing the SE¼ was that the lease expired on September 6, 1979 and the operator had completed a well in the SW¼ on January 7, 1979. A communitization agreement had not been approved for the section as of the expiration date of the Allotted Indian land lease, consequently the lease terminated with a producing well in the adjoining quarter section. Following expiration of the Allotted Indian land lease the operator requested and obtained Oklahoma Corporation Commission approval to de-space the quarter section of Allotted land. That quarter section has report-

edly, never received an allocation of production even though it is within the same section as the producing well and would normally be entitled to share in production. A new lease was issued on the Lydia Penn, Caddo Allotment No. 684 on May 1, 1980 and assigned Lease No. 14-20-202-60852. BLM's Tulsa Office reports that lease received a $75.00 per acre bonus and todate [sic] has not been communitized nor has it received an allocation of production from the well in the adjoining SW¼.

We would also expect the operator of the leases discussed herein to apply for and receive approval to de-space leases that would terminate in the event the disputed communitization agreements are voided. Similarly, had the agreements not been approved we would have expected the operator to request and subsequently receive approval for de-spacing. If de-spacing of section 29 occurs Lease No. 14-20-205-6894 will not be allocated production from the well in that section. Lease No. 14-20-205-7672 and the two (2) remaining fee leases in the section will be allocated all production with the resultant affect of reducing net revenues to the Tribe. We would not expect expired Lease No. 14-20-205-6894 to be a marketable property when clouded in such controversy.

The Tribes requested CERT's analysis of the communitized areas and a copy of CERT's report is attached. CERT's recommendation regarding section 29 (see page 11 of CERT's report) is quoted in part as follows, ". . . . . the Cheyenne-Arapaho Tribes should focus on:

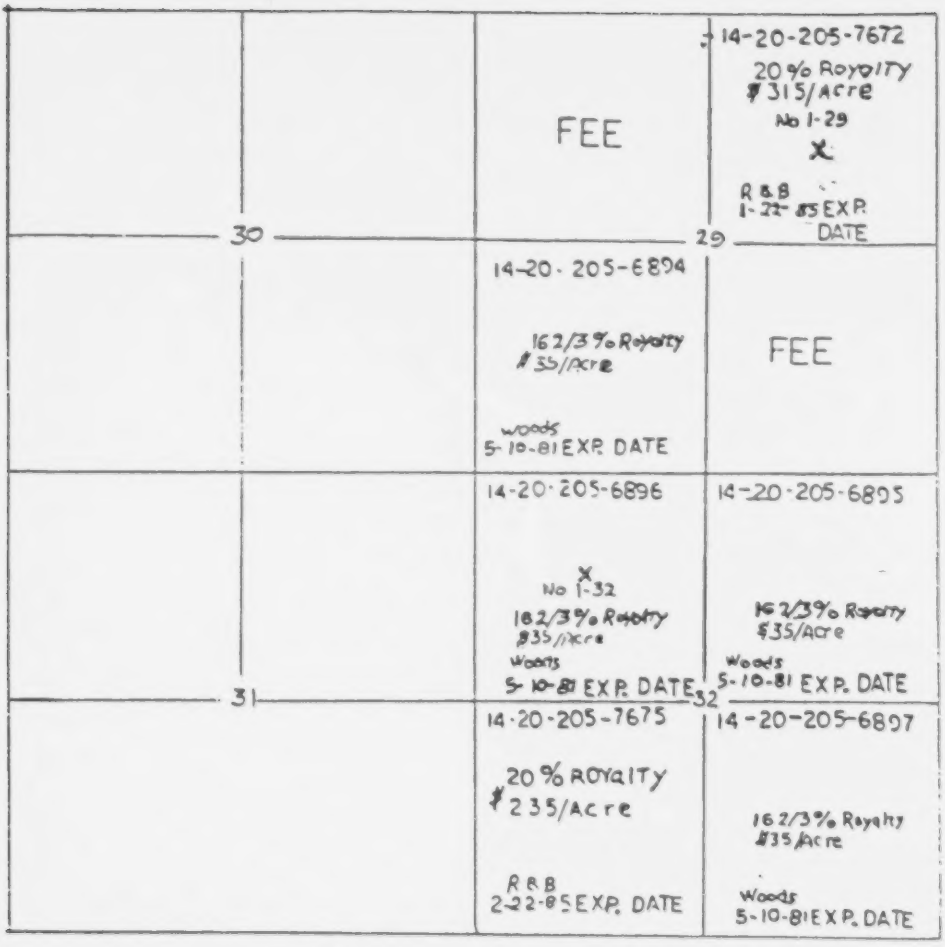
> Limiting (and possibly eliminating) all demands for consessions on leases within section 29."

CERT's report doesn't appear to consider the ramifications of de-spacing to approve communitization or to now void the communitization agreement in section 32 would probably also lead to the operators requesting and receiving approval to de-space that section. If de-spacing were approved, all production would probably be allocated to the

two (2) Tribal land leases in the west half of the section. This would enhance the net royalty receipts of the Tribes since equally dividing the allocated production between a lease with 16 2/3 percent royalty rate and a 20 percent royalty rate will yield a higher average royalty than if divided between a 20 percent royalty rate lease and three (3) 16 2/3 percent royalty rate leases. This marginal increase is clearly not the basis of the dispute as correspondence indicates Woods was willing to raise all royalty rates to 20 percent. This option may still be open. The new market value of terminated leases in the west half of section 32 would be dependent upon whether or not de-spacing was authorized and whether or not the Corporation Commission would authorize increased well densities to facilitate drilling on the east half of the section. We believe they would de-space the section and not authorize an additional well on the east half of the section. The Corporation Commission can enforce a denial of requests for increased well densities or effectively control well spacing by refusing permits authorizing the sale and/or purchase of oil and gas.

We are of the opinion that a uniform policy of refusing to approve communitization agreements in logically spaced areas solely for the reasons that the mineral owners *might* receive additional revenues will eventually diminish the sale of Indian land leases and will not be in the best long term interests of the Tribes. Additionally, if policy essentially mandates denial of communitization approval where higher bonuses and royalties might result, we should then also instruct the BLM to refuse drilling permits for similar reasons. These are synonymous situations and the end result will most assuredly be a negative impact on leasing and development of Indian lands.

David L. Baldwin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20% Royalty
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No 1-29
X
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1-22-85 EXP. DATE
30
29
14-20-205-6894
16 2/3% Royalty
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Woods
5-10-81 EXP. DATE
FEE
14-20-205-6896
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No 1-32
16 2/3% Royalty
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14-20-205-6895
16 2/3% Royalty
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5-10-81 EXP. DATE
31
32
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20% ROYALTY
$235/Acre
R & B
2-22-85 EXP. DATE
14-20-205-6897
16 2/3% Royalty
$35/Acre
Woods
5-10-81 EXP. DATE

CHEYENNE AND ARAPAHO TRIBES OF WESTERN OKLAHOMA

v.

DEPUTY ASSISTANT SECRETARY — INDIAN AFFAIRS (OPERATIONS), READING & BATES PETROLEUM CO., AND WOODS PETROLEUM CORP.[1]

11 IBIA 54

Decided *February 10, 1983*

Appeal from decision of Deputy Assistant Secretary — Indian Affairs (Operations) approving two cooperative unit plans affecting tribal oil and gas leases.

AFFIRMED.

OPINION BY ADMINISTRATIVE JUDGE ARNESS INTERIOR BOARD OF INDIAN APPEALS

The Cheyenne and Arapaho Tribes of Western Oklahoma (appellants) have sought review of the February 9, 1982, decision of the Deputy Assistant Secretary — Indian Affairs (Operations). That decision affirmed a determination of the Acting Anadarko Area Director (Area Director), Bureau of Indian Affairs (BIA), approving the cooperative unit operation of certain Indian trust land leased by appellants to Reading & Bates Petroleum Co. (Reading & Bates) and Woods Petroleum Corp. (Woods) for oil and gas development.

Reading & Bates and Woods entered into oil and gas leases covering restricted Indian land owned by appellants. The first of these leases was approved on May 10, 1976, for sec. 32, T. 14 N., R. 20 W., in Custer County, Oklahoma. A second lease, approved on February 22, 1980, covered the NE 1/4 and SW 1/4 of sec. 29, T. 14 N., R. 20 W., also

[1] Previously denominated *Cheyenne and Arapaho Tribes of Oklahoma* v. *Deputy Assistant Secretary - Indian Affairs (Operations).* The names of the corporate parties are added to reflect their participation as parties to the appeal.

in Custer County. Each of these leases was for a term of 5 years.

On July 17, 1980, Reading & Bates received pooling orders for these two sections from the Oklahoma Corporation Commission. Drilling operations were commenced in sec. 29 on November 30, 1980, and on sec. 32 on May 6, 1981.

When the earlier of these leases was nearing its expiration date, Reading & Bates and Woods sought to retain the lease through the use of a communitization agreement. Under such an agreement, drilling operations on any part of the communitized area would be deemed drilling on all of the leaseholds in the area and would therefore extend the term of the leases even though actual drilling had not been conducted on each and every leasehold. Such cooperative unit operation is often required for the orderly and economic development of oil and gas resources.

On April 16, 1981, appellants rejected the proposed communitization agreements. Appellants indicated they wanted a payment of $1,500 per acre for the 960 acres covered by the leases and a 5 percent carried working interest in all of the affected leases. Unless the agreements incorporated these provisions, they would not sign. This position was reiterated in meetings on May 1 and 4, 1981.

On May 5, 1981, pursuant to Departmental procedures, Reading & Bates submitted the communitization agreements to the Geological Survey for approval, indicating that appellants had been notified of the proposed agreements but had refused to sign. Geological Survey recommended approval of the agreements the same day. The agreements were subsequently approved by the Concho Agency on May 6, 1981, and by the Anadarko Area Office on May 8, 1981.

On May 9, 1981, an employee of Reading & Bates informed appellants by telephone that BIA had approved the agreements. On May 11, 1981, representatives of appel-

lants met with the Area Director, the Director of Tribal Governmental Services, and the Field Solicitor of the Anadarko Area Office. The approval of the agreements was discussed at this meeting. Appellants continued to express their dissatisfaction with the economic terms of the agreements.

Appellants filed a notice of appeal challenging the May 8, 1981, approval of the leases on August 5, 1981. Despite objections from Reading & Bates and Woods that this appeal was not timely filed, the Deputy Assistant Secretary affirmed the Area Director's decision on the merits on February 9, 1982, without discussing the timeliness of the appeal.[2] Appellants' notice of appeal from this decision was received by the Board on April 12, 1982.

On the record before it, the Board finds the decision to approve the communitization agreements at issue was based partly on the exercise of Secretarial discretion and partly on a legal conclusion. Except as such cases may be specifically referred to it, the Board does not have general jurisdiction to review decisions of the BIA made in the exercise of discretionary authority given to the Secretary by Congress. *See* 43 CFR 4.330(a)(2). The ultimate decision whether

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[2] Appellees contend that BIA procedural regulations found at 25 CFR 2.4, required dismissal of this appeal as untimely filed. It appears, as appellees contend, that similar rules within the Department have been strictly construed. *See Kathleen Face* v. *Acting Assistant Secretary - Indian Affairs,* 11 IBIA 35 (1983); *Hamlin* v. *Area Director,* 9 IBIA 16 (1981); *Donald Victor Beck* v. *Bureau of Indian Affairs,* 8 IBIA 210; *On Reconsideration,* 8 IBIA 211 (1980). And *see Ilean Landis,* 49 IBLA 59 (1980); *Northway Natives, Inc.,* 4 ANCAB 207 (1980); *Appeal of Harry Claterbos Co.,* 10 IBCA 216, 84 I.D. 969 (1977); *Royalty Smokeless Coal Co.,* 9 IBMA 306 (1976). Nonetheless, on the record presented, BIA apparently found notice to appellants to have been defective or time limits for appeal were waived under authority of 25 CFR 1.2. At any rate, the matter was considered and decided on the merits in favor of appellees. Any error, if there be any, is harmless.

or not to approve a particular communitization agreement is clearly discretionary under 25 U.S.C. § 396d (1976), which states:

> In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a-396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

This statute clearly places the approval of a communitization agreement within the discretion of the Secretary. The Board is without jurisdiction to review that decision unless the question is specifically referred to it under 43 CFR 4.330(b). No such referral has been made. Therefore, the Board lacks jurisdiction to review the merits of these particular communitization agreements.[3]

The appeal does, however, raise the legal questions whether appellants' approval of the communitization agreements was a prerequisite for Secretarial approval and whether Clause 9 of the leases appellants signed when they leased their land to Reading & Bates and Woods constitutes approval of a future communitization agreement. Clause 9 states:

> Unit operation. — The parties hereto agree to

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[3] Appellants' arguments based on *Kenai Oil & Gas, Inc.* v. *Department of the Interior,* 671 F.2d 383 (10th Cir. 1982), are not within the Board's jurisdiction to review, notwithstanding the attempt by the dissent to apply the holding in that case to the facts here presented. Had the appellant made a showing that BIA approval was not in the best economic interest of the tribe, as the dissent assumes, and caused thereby a breach of the Department's trust responsibility in a legal matter reviewable by the Board, a different result would be possible. These matters, speculated upon by the other Board members, are not raised by the facts now before the Board.

> subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

The Board finds, as did the Deputy Assistant Secretary, that this language constitutes appellants' agreement to abide by any future communitization agreement found by the Secretary or his delegate to be in the best interests of the Indian lessors. In agreeing to the original lease, the appellants also agreed to be bound by the Secretary's determination of whether a communitization arrangement was appropriate.[4]

Therefore, for the reasons discussed above and pursuant to the authority delegated to the Board of Indian Appeals, 43 CFR 4.1, the decision of the Deputy Assistant Secretary — Indian Affairs (Operations) is affirmed.

Franklin D. Arness
Administrative Judge

[4] The Board does not accept appellants' argument that the term "subscribe" in Clause 9 contemplated that their signature on the communitization agreement was required for the agreement to be effective.

CHIEF ADMINISTRATIVE JUDGE HORNTON SPECIALLY CONCURRING:

I agree that it was proper for the Deputy Assistant Secretary to uphold the Area Director's approval of the communitization plan in question. I do not agree, however, that the only legal issues presented by this appeal are "whether appellants' approval of the communitization agreements was a prerequisite for Secretarial approval and whether Clause 9 of the leases * * * constitutes approval of a future communitization agreement" (Opinion, 11 IBIA at 58, 90 I.D. 63).[1]

Appellants submit that while the Secretary's authority

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[1] There is no question that tribal consent is required for communitization agreements to be effective. The requirement is made plain by 25 CFR 171.21(b) (now codified at 25 CFR 211.21(b)).

As to whether or not Clause 9 of the leases constitutes consent to future communitization agreements approved by the Secretary, the Deputy Assistant Secretary held, without discussion, that the clause provides such consent. The main opinion here repeats this conclusion of law.

Appellants contend that the provisions of Clause 9 are ambiguous, requiring resort to the intentions of all parties as to what is meant by the language. The tribes contend they never intended to commit themselves to future communitization plans without any opportunity to consider the particular plan (appellants' opening brief at 25-30). According to appellants, Clause 9 is nothing more than an unenforceable agreement to agree or negotiate in the future.

Presumably, the Deputy Assistant Secretary regarded Clause 9 as a plain and unambiguous statement that the tribes had consented to future communitization plans where they were approved by the Secretary during the period of supervision. That is how I read Clause 9. Considering the two mining leases in their entirety, including their nature, purpose and subject matter, the intent of the parties is apparent from the actual words used in Clause 9. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. This rule applies to Indian leases. *Whatcom County Park Board* v. *Bureau of Indian Affairs*, 6 IBIA 196 (1977).

to approve communitization agreements affecting Indian leases is discretionary under the provisions of 25 U.S.C. § 396d (1976), *no* exercise of discretion "as required by law and by government obligations as trustee of tribal lands" took place in this matter (appellants' reply brief at 6; *see also* appellants' opening brief at 17-18, 20-23). This contention, based on claims that the BIA gave the proposed communitization "rubber-stamp approval" at the "eleventh hour," raises questions concerning the legal sufficiency of the BIA's actions.

That the Secretary or his delegated representative may not rubberstamp proposed communitization plans affecting Indian lands was firmly answered in *Kenai Oil & Gas, Inc. v. Department of the Interior,* 671 F.2d 383, 386 (10th Cir. 1982):

> While it is true that 25 U.S.C. § 396d and 25 C.F.R. § 171.21(b) do not detail any specific standards governing the exercise of the Secretary's discretion in approving communitization agreements, those actions nevertheless are limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands.

The court concluded in *Kenai* that the BIA has an obligation as trustee to ensure that communitization plans are in the Indians' best interest, including a determination that plans are economically satisfactory to Indians. *Id.* at 387.

Because of the jurisdictional limitation which precludes the Board from reviewing discretionary decisions of the BIA, it is correctly noted in the main opinion that it would not be proper for the Board to substitute its judgment for the agency's as to whether a given plan is in the Indians' best interest, economically or otherwise. It is clearly within our jurisdiction, however, to determine whether legally required standards controlling the agency's exercise of discretion in communitization disputes were followed. If legally required standards are found to have been ignored, it would be incum-

bent upon the Board to remand the matter to the agency for appropriate action. *Wishkeno v. Deputy Assistant Secretary — Indian Affairs (Operations),* 11 IBIA 21, 89 I.D. 655 (1982).

The burden of proof is on appellants to show that agency action complained of was legally deficient. *Hazel Hawk Visser v. Bureau of Indian Affairs,* 7 IBI A 22 (1978). Accepting the holding in *Kenai* as controlling law in the case before us, this means appellants must show that BIA's communitization approval was not in the tribes' best economic interest. This appellants failed to do. Nor does the record as constituted support appellants' allegation that the BIA rubberstamped its approval of recommendations submitted by the Geological Survey. While it appears the case that the Concho Agency approved the agreements on the same day they were approved by the Geological Survey, and that subsequent approval by the Anadarko Area Office occurred within 48 hours, these facts, standing alone, do not prove that the BIA failed to evaluate the communitization plan from the standpoint of what was best for the tribes. It is obvious from the record that although formal BIA approvals were obtained very near the expiration time for one of the leases, all parties had vigorously discussed communitization agreements reasonably in advance of any lease termination. Under the circumstances, it was perhaps not difficult for officials accustomed to such matters to evaluate a Geological Survey recommendation on an expedited basis.[2]

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[2] Following the *Kenai* decision, the BIA adopted guidelines relating to the approval of communitization agreements which, among other things, encourage lessees of Indian lands to submit proposed plans to the BIA not less than 90 days prior to the expiration date of the first Indian lease in the proposed unit. The guidelines require that Superintendents and Area Directors prepare a written determination, based upon logical engineering and economic facts, that a proposed agreement and its long term effects are in the best interests of the Indian lessor (see appellants' opening brief, Appendix 16).

Appellants' contention that the BIA routinely approves any communitization plan presented by the Geological Survey is not persuasive. The very matter at issue in *Kenai* was the BIA's disapproval of a communitization agreement which the agency concluded was not in the Indian lessor's best economic interest.

For the additional reasons given, I specially concur that the decision appealed from be affirmed.

Wm. Philip Horton
Chief Administrative Judge

ADMINISTRATIVE JUDGE MUSKRAT CONCURRING IN PART AND DISSENTING IN PART:

The factual and legal issues involved in the appeal presently before the Board are identical to those examined by the Tenth Circuit Court of Appeals in *Kenai Oil & Gas, Inc. v. Department of the Interior,* 671 F.2d 383 (10th Cir. 1982). The analysis and reasoning of the circuit court in that case, therefore, are directly applicable to the case at bar. Consequently, application of the *Kenai* holding necessitates my concurring in part and my dissenting in part from the decision of my colleagues.

I agree that appellee's motion for dismissal on grounds of untimeliness should be denied and that the Board has jurisdiction to review the legal sufficiency of the BIA's decision to approve these communitization agreements, though not the substantive content of that decision. Furthermore, I agree that the statutory and regulatory scheme regarding the communitization of oil and gas leases on Indian trust lands was correctly followed in this instance and that Clause 9 of the lease constitutes the tribe's prior consent to a reasonable communitization agreement approved by the Secretary.

I respectfully dissent from my colleagues, however, with regard to whether or not the Federal trust responsibility to the Indian lessors was fulfilled in this case. In light of *Kenai,* I would remand this case to the Bureau for action consistent with that decision, and with the specific communitization guidelines and general policy pronouncement regarding approval of communitization agreements issued in response to *Kenai* by the Deputy Assistant Secretary — Indian Affairs (Operations) and published in the *Federal Register.*

As does the case before us, *Kenai* involved a challenge to the exercise of the Secretary's authority to approve a communitization agreement of oil and gas leases on Indian trust lands. After quoting 25 U.S.C. § 396d (1976) and 25 CFR

171.21(b) (now 25 CFR 211.21(b)), the court explained:

> While it is true that 25 U.S.C. § 396d and 25 C.F.R. § 171.21(b) do not detail any specific standards governing *the exercise of the Secretary's discretion in approving communitization agreements,* those actions nevertheless are *limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands.* Pursuant to the trust responsibilities of the United States, the Department of the Interior is charged with the administration and supervision of oil and gas leases on restricted tribal lands. 25 U.S.C. §§ 396a–396f. Acting in the capacity as a trustee, the Secretary and his delegate, the Superintendent of the BIA, must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues. *Gray v. Johnson*, 395 F.2d 533, 536 (10th Cir.), *cert. denied*, 392 U.S. 906, 88 S.Ct. 2056, 20 L.Ed.2d 1364 (1968).
>
> * * * * * * *
>
> ***In light of these trust responsibilities, the Superintendent must take the Indians' best interests into account when making any decision involving leases on tribal lands, and has broad discretion to consider all factors affecting their interests. The Superintendent has no obligation to approve a plan which does not serve the Indians' best interests and he has acted within his discretion in refusing to approve an economically unsatisfactory plan. [Italics added.]

71 F.2d at 386, 387. *Kenai,* thus, clearly establishes that although the authority to approve or disapprove communitization agreements is discretionary, its exercise must be within the legal framework of the trust responsibility owed by the United States Government to the Indian tribes and people.

The Deputy Assistant Secretary responded to the *Kenai* decision by issuing to all BIA area directors a memorandum, dated April 23, 1982, setting forth guidelines for the approval of communitization agreements. The memorandum stated:

> [T]he recent decision of the 10th Circuit Court of Appeals in *Kenai* * * * provides us with some guidance on the scope of * * * [BIA's] authority [to approve communitization agreements of Indian oil and gas leases]. Therefore, the following guidelines have been developed to assist Area Directors and Superintendents in exercising this authority.
>
> * * * * * * *
>
> 2. The Secretary has the discretion to approve or disapprove Communitization or Unit Agreements based on a determination of whether approval would be in the best interests of the Indian lessor. Area Directors and Superintendents must prepare such a determination in writing, based on logical engineering and economic facts, whether the agreement is approved or disapproved, and that document should be given to the applicant and the Indian lessor. In determining whether the agreement is or is not in the best interest of the Indian lessor, the following should be considered:
>
> a) The long term economic effects of the agreement must be in the best interest of the Indian lessor and we must be able to document these effects.
>
> b) The Minerals Management Service is required to recommend approval or disapproval based upon the engineering and technical aspects of the agreement to assure protection of the interests of the Indian lessor, and BIA officials should rely on that recommendation.
>
> c) The lessee in question must have complied with the terms of the lease in all respects, including the commencement of drilling operations, or actual drilling, or

actual production in paying quantities (depending on the terms of the lease), within the unit area prior to the expiration date of any Indian lease.

d) Central Office must approve any format of a Communitization Agreement developed by an Agency or Area Office before implementation.

e) Applications to form Communitization Agreements should include an affidavit certifying that all Indian mineral owners have been given notice of the pending action.

* * *

f) The party applying for approval of a Communitization Agreement may be requested to provide copies of farm out or similar type agreements in cases where such agreements could have a bearing upon the ownership of the working interest in the unit.

An announcement of the adoption of these guidelines was published in the *Federal Register* (47 FR 26920 (June 22, 1982)). The explanatory material appearing in the *Federal Register* stated:

> It is the intent of the BIA that in exercising the Secretary's discretionary authority to approve or disapprove communitization or unit agreements, BIA officials should take into consideration the Indian owner's best interests and consider all of the factors, including economic considerations, as prescribed by the U.S. Court of Appeals in its decision in *Kenai Oil and Gas, Inc. v. Department of the Interior,* 671 F.2d 383 (February 17, 1982). In that decision * * * [t]he Court concluded that the Secretary, acting in his capacity as a trustee, has the responsibility to manage Indian lands so as to make them profitable for the Indian and to maximize lease revenues. Accordingly, the new guidelines require that in the future BIA Area Directors and Superinten-

dents must prepare a written determination, based upon logical engineering and economic facts, that a proposed agreement is in the best interests of the Indian lessor. The guidelines also require that the long term effects of the agreement must be in the best interests of the Indian lessor and these effects must be documented.

The Bureau is aware that the process of reaching the determinations required by the guidelines will require that Area Directors and Superintendents receive proposed agreements sufficiently in advance of the expiration of the primary term of any Indian lease within the proposed unit in order to conduct an adequate review of the engineering and economic factors involved.

Consequently, in order to ensure adequate consideration, lessees of Indian lands are encouraged to submit all future communitization agreements to the appropriate Bureau of Indian Affairs office not less than 90 days prior to the date of expiration of the first Indian lease in the proposed unit.

The facts of the present appeal raise a serious question as to whether or not the BIA's approval of the communitization agreements in question comports with the requirements of its trust responsibility as set forth in the guidelines and policy statement. The BIA's "eleventh hour" approval of the communitization agreements, the summary recommendation by the Concho Agency for approval of the agreements the very day they were approved by Geological Survey, and the subsequent approval by the Anadarko Area Office within the next 48 hours all cast doubt as to whether the BIA exercised its discretionary authority in conformity with its trust responsibility to the Indian lessors as interpreted by both the Tenth Circuit Court and the Department. Few, if any, of the present guidelines for approval of communitization agreements appear to have been followed. Neither the original decision of the Acting Area Director to approve the communitization agreements, nor the affirmance by the Deputy

Assistant Secretary adequately considers the Government's trust responsibility. Nor has BIA provided a justification or explanation on appeal. The facts of this case raise reasonable doubt that the BIA's action comports with its recognized and delineated trust responsibility regarding approval of communitization agreements. Therefore this case should be remanded to the BIA for action consistent with its trust responsibility as defined by the Tenth Circuit in *Kenai* and by the Bureau itself in its guidelines and policy pronouncement.

Such a remand, however, is not only justified by the facts of this case but is required as a matter of course. Although the *Kenai* decision of February 17, 1982, postdated the decision of the Deputy Assistant Secretary which is the subject of this appeal, this Board is bound by the circuit court opinion and consequently its own decision and disposition must be in accord. Remand then to the Deputy Assistant Secretary with instructions for him to exercise his discretion according to the procedures (*e.g.*, guidelines) and policies (*e.g., Federal Register* notice) adopted by the Department in compliance with *Kenai* is obligatory.[1]

---

[1] As this Board observed in a previous decision involving the trust responsibility:

> "After the trust responsibility is established, it is appropriate for those departments of the Federal Government charged with executing the trust to determine, initially at least, the specific content of the fiduciary role. * * * However, courts and by analogy the Board, in its quasi-judicial capacity, have the authority to review actions of the trustee * * * and to direct the trustee in regard to the fulfillment of its trust responsibilities. * * * In fact, once the trust responsibility is established, there can be judicial establishment of the standard of care owned by the Government under its fiduciary duty. * * * And, as the Supreme Court has indicated, 'Generally, when a trustee is in doubt as to what course to pursue, the proper procedure for him to follow is to conform his conduct to the instructions given him by the courts.' "

Roger St. Pierre v. *Commissioner of Indian Affairs*, 9 IBIA 203, 236-37, 89 I.D. 132, 147 (1982), disapproved, in part, on other grounds in *Burnette* v. *Deputy Assistant Secretary*, 10 IBIA 464, 89 I.D. 609 (1982) (citations omitted).

In conclusion I wish to emphasize that on remand the substantive decision to approve or disapprove the communitization agreements would not be at issue. This decision is clearly discretionary. Rather, a remand would merely require that the decision be made within the legal parameters set forth by the court and adopted by the Department. *Wesley Wishkeno v. Deputy Assistant Secretary — Indian Affairs (Operations),* 11 IBIA 21, 89 I.D. 655 (1982).

For these reasons, I respectfully dissent from the affirmation of the Deputy Assistant Secretary's approval of the communitization agreements. Under the circumstances of this case, the BIA's actions and decisions, without more, costitute a clear breach of the trust responsibility and fiduciary duty owed the appellant lessors.

Jerry Muskrat
Administrative Judge

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

In Reply Refer To: Energy and Mineral Resources

CERTIFIED MAIL — RETURN RECEIPT REQUESTED

February 9, 1982

Ms. Anita Remerowski
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

Dear Ms. Remerowski:

This is in response to the appeal filed by the Native American Rights Fund on behalf of the Cheyenne-Arapaho Tribes of Oklahoma contesting the approval on May 8, 1981, by the Acting Director, Anadarko Area Office, of two communitization agreements involving tribal lands. One agreement covers lands in Sec. 29, T.14N., R.20W., I.M. and the other covers lands in Sec. 32, T.14N., R.20W., I.M., Custer County, Oklahoma.

The appellants contend that the two agreements were subject to ratification by the affected Tribes in addition to approval by the Bureau of Indian Affairs to have force and effect. You argue in the appeal that tribal consent is required under the Indian Reorganization Act of 1934, 25 U.S.C. S.476 and the Indian Mineral Leasing Act of 1938, 25 U.S.C. S.396a-g, which was passed to bring federal laws into harmony with the IRA and that Tribal consent of communitization agreements in 25 C.F.R. S.171.21(b) is required.

The Communitization Agreements were timely presented for approval and drilling operation, were commenced on each prior to the earliest lease expiration dates of May 10, 1981. Each lease provides that "If the lessee shall commence to drill a well within the term of this lease, the lessee shall

have the right to drill such well to completion with reasonable diligence and if oil or gas, or either of them, be found in paying quantities, this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned."

Pursuant to Section 9 - Unit operation of each lease, the parties to the lease agree, "to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision." It is our view that this agreement constitutes tribal consent to the communitization agreements pursuant to 25 C.F.R. S.171.21(b).

I have carefully considered the arguments made in this appeal and have concluded that they do not present any basis for reversing the Acting Area Director's approval of the two Communitization Agreements. Accordingly, the decision of the Acting Area Director is affirmed. Because this decision is based upon an interpretation of law it will become final 60 days from receipt hereof unless an appeal is filed with the Board of Indian Appeals pursuant to 43 C.F.R. 4.354 and 4.355.

Sincerely,

Deputy Assistant Secretary -
Indian Affairs Operations

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA,	)	
Plaintiff-Appellee, Cross-Appellant,	)	
v.	)	Nos. 89-6270
WOODS PETROLEUM CORPORATION,	)	89-6355
Defendant-Appellant, Cross-Appellee.	)	

ORDER

Filed November 2, 1992

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges, and BRIMMER*, District Judge.

---

*The Honorable Clarence A. Brimmer of the United States District Court for the District of Wyoming, sitting by designation.

This matter comes on for consideration of the petition for rehearing filed by the Cheyenne-Arapaho Tribes of Oklahoma, and the petition for rehearing with suggestion for rehearing en banc filed by Woods Petroleum corporation.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all of the judges of the court who are in regular active service. The court having been polled on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied. Judges Baldock, Ebel, and Kelly would grant rehearing en banc.

Entered for the Court
ROBERT L. HOECKER, Clerk

By Patrick Fisher
Chief Deputy Clerk

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Constitution

U.S. Const., amend. V:

> No person shall . . . be deprived of . . . property, without due process of law . . . .

Statutes

5 U.S.C. § 706:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .

25 U.S.C. § 396d:

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

Regulations in effect in 1981

25 C.F.R. § 171.21:

> (a) Oil and gas leases issued under the provisions of the regulations in this part shall be subject to imposition by the Secretary of the Interior of such restrictions as to time or times for the drilling of wells and as to the production from any well or wells as in his judgment may be necessary or proper for the protection of the natural resources of the leased land and in the interest of the lessor. In the exercise of his judgment the Secretary of the Interior may take into consideration, among other things, the Federal laws, State laws, regulations by competent Federal or State authorities, lawful agreements among operators regulating either drilling or production, or both, and any regulatory action desired by tribal authorities.
>
> (b) All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

30 C.F.R. § 221.1:

> The regulations in this part will govern the development and production of deposits of oil, gas, and casing head or natural gasoline . . . and lands containing such deposits owned or controlled by the United States, and under jurisdiction of the Secretary by law or administrative arrangement . . . .

30 C.F.R. § 221.4:

> The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this

part, and all other applicable regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste. Inasmuch as conditions in one area may vary widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the supervisor, and to any real plan of development that may be adopted pursuant to law . . . .

30 C.F.R. § 221.11:

> The supervisor shall approve well-spacing and well-casing programs determined to be necessary for the proper development of the leases and assist and advise lessees in the planning and conduct of tests and experiments for the purpose of increasing the efficiency of operations.

30 C.F.R. § 221.21(a):

> When required by the supervisor, the lessee shall submit an acceptable well-spacing and well-casing program for the lease or area. Such program must be approved by the supervisor and may be modified from time to time as conditions warrant, with the consent and approval of the supervisor.

Lease provisions having regulatory effect:

Tribal Leases, ¶ 2:

> The term "oil and gas supervisor" as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent" as used herein shall refer to the

superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased.

Tribal Leases, ¶ 3:

In consideration of the foregoing, the lessee hereby agrees:

. . .

(b) Wells. – (1) To drill and produce all wells necessary to offset or protect the leased land from drainage . . . *Provided*, That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the oil and gas supervisor . . . (2) at the election of the lessee to drill and produce other wells: *Provided*, That the right to drill and produce such other wells shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regulations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated . . . .

. . .

(f) Diligence, prevention of waste. – To exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby . . . [and] to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land . . . .

(g) Regulations. – To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including 30 CFR 221 . . . .

Tribal Leases, ¶ 8:

Drilling and producing restrictions. – It is covenanted and agreed that the Secretary of the Interior

may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.

Tribal Leases, ¶ 9:

Unit operation. - The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

Supreme Court, U.S.
FILED
JAN 11 1993
OFFICE OF THE CLERK

No. 92-970

In The

Supreme Court of the United States

October Term, 1992

WOODS PETROLEUM CORPORATION,

Petitioner,

v.

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

In its Petition for a Writ of Certiorari, Woods Petroleum Corporation (hereinafter "Woods") grossly mischaracterizes the facts and proceedings in this case. Therefore Respondent, the Cheyenne-Arapaho Tribes of Oklahoma (hereinafter "Tribe")[1] respectfully submits this Counterstatement of the Case, and also refers this Court to the statement of facts set forth in the Tenth Circuit's decision, Cert. App. 2-8,[2] and in the district court's decision, Cert. App. 18-23.

The facts of this case revolve around the unique escalated oil and gas market in the early 1980s. In the Anadarko, Oklahoma area, the Bureau of Indian Affairs Acting Area Director reported that "deep gas discovery prompted a short period of astronomical bids on advertised mineral tracts." Cert. App. 45. Indeed, a comparison of the Indian mineral lease bonuses obtained for various Indian and tribally owned tracts in the Anadarko area during this period shows that the bonuses for tribal leases approved in the late 1970s amounted to only $35 per acre with a royalty rate of 16⅔%. In sharp contrast, bonuses for leases in the same area which were approved in the early 1980s ranged from $235 to $315 per acre with

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[1] The Cheyenne-Arapaho Tribes of Oklahoma is a federally recognized tribe organized under a constitution and by-laws approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. § 503, with a governing body called the Cheyenne-Arapaho Business Committee, which is authorized to enter into oil and gas leases on the Tribe's behalf.

[2] "Cert. App." refers to the Appendix to Woods' Petition for a Writ of Certiorari.

an increased royalty rate of 20%. (Cert. App. 93, 123, 131, 136).

The Tribe owns six 160-acre tracts of land located in sections 29 and 32 in Custer County, Oklahoma, within the Anadarko area. This land is held in trust by the Untied States for the benefit of the Tribe. Four of these tracts were separately leased to Woods for the purpose of oil and gas production. The three tribal leases at issue in Woods' Petition do not involve drilling operations.[3] The fourth tribal lease[4] (not at issue in this proceeding) is the site of the well for the section 32 drilling and spacing unit and was the subject of a cross-appeal by the Tribe in the Tenth Circuit.[5] *See* map, Cert. App. 136. The Secretary of the Interior (hereinafter "Secretary") approved these tribal leases pursuant to his authority under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-g, 52 Stat. 348.

Each lease contains a "habendum clause", which fixes a primary term of 5 years ending May 10, 1981, and

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[3] These leases include number 14-20-205-6897, covering the southeast quarter of Section 32-14N-20W; lease number 14-20-205-6895, covering the northeast quarter of Section 32-14N-20W; and lease number 14-20-205-6894, covering the southwest quarter of Section 29-14N-20W.

[4] The fourth lease is number 14-20-205-6896, covering the northwest quarter in Section 32-14N-20W.

[5] Another oil and gas company, Reading and Bates Petroleum Co., is the lessee of the fifth and sixth tribal leases in sections 29 and 32. The fifth tribal lease, number 14-20-205-7672, covering the northeast quarter in Section 29-14N-20W, is the well site for the section 29 drilling and spacing unit. These tribal leases are not at issue in the present case.

which provides that the lease will automatically expire, absent development by a producing well before the end of the 5-year primary term. Each lease also contains a "commence drilling" clause, which purports to extend the life of the lease beyond the primary term upon the commencement of drilling on the leasehold. Each lease further contains a clause (referred to as "clause 9" in the lower courts' opinions) allowing the lease to be made subject to a communitization agreement approved by the Secretary.[6] Such communitization agreement would pool the lease with other leases into one development or communitized unit for the purposes of maximizing development of the mineral resources, and apportioning among the leases in the unit the costs and revenues from the unit well(s). And finally, each of these leases was purportedly subject to a communitization agreement which provides, *inter alia*, that any unit well will be deemed to be actually drilling on every lease within the unit, thus satisfying the actual drilling requirement of such lease.[7]

---

[6] *See* § 4 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396d, and the Secretary's implementing regulations:

> All such leases shall be subject to any cooperative or unit development plan affecting the leased lands, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

25 C.F.R. § 171.21(b) (1981); 25 C.F.R. § 211.21(b) (1991); *Kenai Oil and Gas, Inc. v. Dept. of Interior*, 671 F.2d 383, 385-386 (10th Cir. 1982).

[7] The clause of the communitization agreements provides in pertinent part: "It is further agreed that the actual drilling, completion, continued operation or production of a well or wells for communitized substances on the communitized area shall be construed and considered as the actual drilling,

In anticipation of the expiration of the tribal leases, Woods began the process of communitizing all lease interests in sections 29 and 32. Woods entered into two communitization agreements with certain non-Indian working interest and royalty owners of the leases in those sections. And beginning on April 16, 1981, Woods initiated efforts to obtain the consent of the Tribe and the Secretary to these communization agreements for the purpose of continuing in force the three non-drilling tribal leases. Without approved communitization agreements, these tribal leases would expire by their own terms on May 10, 1981. Cert. App. 131.

During several meetings between the Tribe's Business Committee, the working interest owners' representatives, and the officials from the Bureau of Indian Affairs Anadarko Area Office, the Tribe declined to approve the proposed communitization agreements. The Tribe instead requested that the oil companies renegotiate the tribal leases commensurate with the escalated oil and gas market during the boom period then in effect.

The oil companies rejected the Tribe's request to renegotiate, and presented the Tribe with an ultimatum to "sign [the communitization agreements] by May 6, or face litigation", Ad. Rec. 611, and that in the even that the tribal leases were lost for failure to communitize, the oil companies would "pursue every legal remedy" available in order to receive restitution for the losses it might sustain. Cert. App. 4, 21.

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completion, continued operation and production from each and all of the lands within and comprising said communitized area." Tribal leases, ¶ 9; Cert. App. 161.

On May 5, 1981, the oil companies submitted the communitization agreements to the United States Geological Survey, which recommended approval of the agreements the following day. On May 8, 1981, notwithstanding the Tribe's opposition, the Acting Area Director for the Bureau of Indian Affairs Anadarko Area, as the Secretary's delegate, also approved the agreements. The record indicates that at the time he approved the agreements, thereby purportedly extending the life of the leases, the Acting Area Director failed to consider the unique economic conditions, including the escalated market value and the marketability of the leases. Cert. App. 94.

The Tribe then filed a timely appeal to the Interior Board of Indian Appeals (hereinafter "IBIA"), which subsequently affirmed the Secretary's[8] decision. The IBIA granted the Tribe's request for reconsideration and also provided the Secretary with an opportunity to supplement the record to explain the basis for the decision reached in 1981. On May 18, 1984, the IBIA again affirmed the Secretary's decision approving the communitization agreements, holding that since the "long term" economic effects had been considered, the agency had not abused its discretion.

The Tribe commenced this action on July 14, 1984, against the Secretary and Woods seeking district court review of the Secretary's decision approving the two communitization agreements. Upon review of the record,

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[8] In the lower courts' decisions, the term "Secretary" generally refers to the Secretary of the Interior and his delegates, including the Acting Area Director.

the district court concluded that the administrative record was insufficient to resolve the issues. The district court remanded the case to the Secretary with orders to provide further explanation of the basis of the agency's decision. In particular, the court inquired whether the Secretary considered the market value and marketability of the tribal leases before approving the proposed communitization agreements. In his Response, the Secretary admitted that he "did not consider any evidence of the market value and marketability of new leases." Cert. App. 94.

On consideration of the cross-motions for summary judgment subsequently filed by the parties, the district court found that the Secretary breached his fiduciary responsibilities to the Tribe under the Indian Mineral Leasing Act by approving the communitization agreements without considering contemporary oil and gas market conditions. As a consequence of this breach, the district court found that the Secretary's approval of the communitization agreements was invalid, and the leases for the three tracts upon which no drilling has occurred had expired on May 10, 1981 – the end of their primary terms. Cert. App. 50-51, 60. The Tenth Circuit affirmed, without modification, the district court's order on this issue. Cert. App. 17.

REASONS FOR DENYING THE WRIT

I. THE QUESTION OF WHETHER THE LOWER COURTS USURPED THE SECRETARY'S AUTHORITY INVOLVES ISSUES NOT PASSED UPON BY THE LOWER COURTS, AND THUS IS PREMATURELY RAISED IN THIS COURT.

A. The Lower Courts Have Not Substituted Their Judgment For That Of The Secretary's By Making Factual Findings Concerning The Market Value/Marketability Factor.

Woods contends,

> The Court of Appeals has decided *de novo* how the Secretary *should have ruled* had he considered the omitted [economic] factor, rather than remanding this matter to allow the Secretary, as required by law, to determine communitization with the additional factor announced by the court. This *judicial* intervention . . . is an unprecedented usurpation of the Secretary's congressionally conferred authority. . . .

Cert. Pet. at 8-9 (emphasis in original). As shown below, this contention is untenable because it erroneously assumes that the lower courts' decisions were grounded upon a factual finding as to the omitted market value/marketability factor. The lower courts have not made a factual finding on this factor.

The lower courts found that the tribal leases could have been continued in force beyond May 10, 1981, either by actual drilling on the leaseholds pursuant to express

provision of the leases,[9] or by application for an approved communitization agreement[10] pooling the tribal leases with other leases into one drilling and production unit. Neither of these preconditions was met in this case.

First, it is undisputed that no well was actually drilled on any of the three tribal leases. And second, the lower courts found that the communitization agreements were ineffective to continue the leases in force because the Secretary's approval ignored a critical relevant factor:

> [T]he Secretary . . . should have considered the economic realities of an oil and gas lease in the Anadarko region in the early 1980's as compared to 1976. The failure to do so was arbitrary, capricious, and an abuse of discretion.

Cert. App. 17. Accordingly, the lower courts held that the Secretary's failure to consider the 1981 market value of

---

[9] As provided in the habendum clause of the leases, the lease is "for the term of 5 years . . . and as much longer thereafter as oil and/or gas is produced in paying quantities." ¶ 1 of tribal leases. A commence drilling clause in the leases provides: "If the lessee shall commence to drill a well within the term of this lease, the lessee shall have the right to drill such well to completion with reasonable diligence and if oil or gas, or either of them, be found in paying quantities this lease shall continue in force with like effect as if such well had been completed within the term of years first mentioned." ¶ 1 of tribal leases.

[10] Where tribal leases are involved, 25 U.S.C. § 396d requires that the Secretary approve communitization agreements. The law in the Tenth Circuit is that because communitization agreements operate to extend leases beyond their primary terms, the Secretary must consider, among other relevant factors, the current market conditions for such leases in determining whether to approve communitization agreements. *See, Kenai Oil and Gas, Inc. v. Dept. of Interior,* 671 F.2d 383 (10th Cir. 1982).

the leases rendered his approval of the communitization agreements ineffective *to the extent* those agreements purported to extend the life of the non-drilling leases beyond their primary terms. *See* discussion *infra* pp. 10-11.

Having thus found that neither of the two precondition for continuing the tribal leases in force was met in this case, the lower courts implicitly held that the leases expired *by operation of their express terms.* Contrary to Woods' contention, the lower courts did not usurp the Secretary's authority and make a factual finding that 1981 market conditions mandated that the existing leases be allowed to expire and new tribal leases be negotiated.

Thus, in summary, the lower courts held that the tribal leases expired on May 10, 1981, at the end of the 5-year primary terms, by operation of their own provisions. There has been no factual finding either by the lower courts or by the Secretary as to the market value/marketability factor.

B. The Lower Courts Have Not Yet Addressed The Question Of Whether The Communitization Agreements Should Be Given Effect In Whole Or In Part.

Woods contends that the Tenth Circuit has resolved the question of whether the communitization agreements should be given effect in whole or in part. This is incorrect. The lower courts have not passed upon this

question, and therefore, Supreme Court review is inappropriate.[11]

The question of the continued effectiveness of the communitization agreements has been expressly reserved by the district court's order of May 26, 1989, for the remedies stage of proceedings in this case. Significantly, the court did not find that the communitization agreements were void *in toto*. The district court specifically held that,

> in approving the subject communitization agreements, the Area Director breached his trust responsibility to the Tribe under the [Indian Mineral Leasing Act of 1938]. *Therefore, the subject communitization agreements do not extend the non-drilling 1976 leases, and these leases thus expired at the end of their primary terms.*

Cert. App. 51-52 (emphasis added).

That the district court did not find the communitization agreements void *in toto* is confirmed by a subsequent order entered on May 31, 1989. This order specifically addresses the question of whether the communitization agreements are partially effective to unitize the tribal lands covered by the expired leases, thus entitling the Tribe to share in the proceeds of a second well drilled on non-Indian land in the section 29 unit. In this order, the

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[11] This Court does "not ordinarily consider questions not specifically passed upon by the lower court. . . . " *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984); and *see, State Farm Mutual Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945); and *Adler v. Board of Education*, 342 U.S. 485, 496 (1952).

district court expressly stated that it had reserved judgment on the validity of the communitization agreements:

> The question of the proper distribution of proceeds from the Hughes No. 2-29 well *if the section 29 communitization agreement is deemed invalid has not yet been determined.*

Resp. App. 2 (emphasis added).[12] The district court further stated:

> The Tribe has challenged the instrument that entitles it to royalties from the Hughes No. 2-29 well that are attributable to the Reading and Bates lease (i.e. the communitization agreement for section 29). *The impact of the Tribe's challenge* on the distribution of funds in section 29 *has yet to be determined,* and deposit of the funds with the Court is therefore justified.

Resp. App. 3 n.1 (emphasis added).

Woods apparently contends that the Tenth Circuit's ruling as to the validity of the communitization agreements precludes further review of this issue by the district court. Woods apparently bases this contention on the italicized portion of the following language in the Tenth Circuit's decision:

> Because the Secretary abused his discretion, *the communitization agreements are not valid,* and the leases upon which drilling had not commenced as of May 10, 1981, expired on that date. Accordingly, the order of the district court granting summary judgment to the Tribe is AFFIRMED.

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[12] "Resp. App." refers to the Appendix to this brief.

Cert. App. 17. However, properly viewed in context and in light of the district court's decision, which was affirmed without modification by the Tenth Circuit, it is clear that the statement was intended, not to overrule the district court's ruling reserving questions as to the future effectiveness of the communitization agreements,[13] but

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[13] Arguably, in the Tenth Circuit, the lower courts' rulings that the tribal leases expired is not inconsistent with a remand to the Secretary to consider the previously ignored economic factors, and, if appropriate, to approve the communitization agreements retroactively to the date they were submitted for approval prior to the expiration of the leases. In *Cotton Petroleum Corp. v. Dept. of Interior*, 870 F.2d 1515, 1523 n.1 (10th Cir. 1989), the Tenth Circuit decided that where a communitization agreement is submitted to the Secretary for approval before a lease expires, and that Secretary approves the agreement *after* the lease expires, the approval will relate back to the date of submission, thereby reviving the leases and continuing them in force. The dissent in *Cotton* seemingly agreed that the Secretary has authority to make his post-expiration approval retroactive to the date the communitization agreement was submitted, but indicated disagreement to the extent the majority may have adopted the view that the Secretary lacked discretion to decide not to have such approval relate back to revive the leases. *Id.* at 1529-30. However, the *Cotton* holding, applying the doctrine of relation back to allow the Secretary to revive expired leases, is based upon questionable authority. The cases relied upon by the *Cotton* court uphold the Secretary's authority to relate his approval of a document back to a date preceding a deadline where the deadline was fixed by the Secretary's own rules and regulations which he has the power to suspend. Since the Secretary is not a party to the leases, arguably he would have no power to suspend the provisions of those leases mandating a deadline for automatic expiration.

simply to affirm the district court's ruling that the communitization agreements were ineffective to extend the life of the tribal leases.

II. THE DECISIONS BELOW CREATE NO INTER- OR INTRA-CIRCUIT CONFLICT REQUIRING THIS COURT'S REVIEW.

A. The Federal Circuit's Ruling in *United Nuclear* is Consistent With The Tenth Circuit's Ruling in the Present Case.

Woods contends that the Tenth Circuit's decision conflicts with the Federal Circuit's decision in *United Nuclear Corp. v. United States,* 912 F.2d 1432 (Fed.Cir. 1990) (hereinafter *United Nuclear*). Woods hypothesizes that if the Secretary had rejected the tribal leases in 1981 based upon the economic factor, under the holding in *United Nuclear,* that action would have constituted a partial basis for a regulatory taking claim. Cert. Pet. at 11. To the contrary, the rationale applied by the Tenth Circuit in the present case is entirely consistent with the Federal Circuit's rationale in *United Nuclear.*

In *United Nuclear,* a mining company had two mining leases with the Navajo Tribe which were due to expire unless the Secretary of Interior, pursuant to this statutory authority,[14] approved its mining plan. The Secretary, however, gave the Tribe a veto over the mining plan. The Tribe subsequently vetoed the plan. Based solely upon the Tribe's veto, the Secretary refused to approve the

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[14] *United Nuclear,* 912 F.2d at 1434; *citing* 25 U.S.C. § 396a (1970) and 25 C.F.R. § 171.2 (1971).

plan. Thus, the issue before the court was whether the Secretary's refusal to approve the mining plan formed part of the basis for a fifth amendment regulatory taking of the lessee's property interests. 912 F.2d at 1436.

The Federal Circuit held that the Secretary delegated to the Tribe all of his discretionary authority to approve a mineral development plan, and in effect, failed to make an independent evaluation of such plan. The court found that these facts, *inter alia*, constituted partial grounds for a regulatory taking. *Id.*[15]

Woods' reliance on *United Nuclear* is misplaced. Woods ignores the critical fact that in *United Nuclear*, the Secretary completely failed to exercise any discretionary authority over the approval of the mining plan.

In the present case, however, the Secretary did not delegate any of his discretionary authority to the Tribe. Indeed, the Secretary ignored the Tribe's wishes that he not approve the communitization agreements so that the tribal leases could be renegotiated. Cert. App. 4, 21. Here, the Secretary abused his discretion by failing to consider one critical factor relevant to the approval of the communitization agreements. Thus, in this case, the Secretary did not abdicate his authority to approve communitization agreements.

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[15] In *United Nuclear*, the Federal Circuit based its analysis of the regulatory taking issue on three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. 912 F.2d at 1435.

United Nuclear therefore provides no basis for finding that the hypothetical rejection of the communitization agreements in 1981 would have constituted a partial basis for a regulatory taking claim. Accordingly, the Federal Circuit's holding in *United Nuclear* does not conflict with the Tenth Circuit's holding in the present case.

B. The Present Case And *Cotton* Are Corollaries To The General Rule Established In *Kenai*; Thus There Is No Intra-Circuit Conflict.

Woods also contends that the decisions in this case are inconsistent with the Tenth Circuit's decision in *Cotton Petroleum Corp. v. Dept. of Interior*, 870 F.2d 1515 (10th Cir. 1989) (hereinafter *Cotton*). Cert. Pet. at 12. However, the decisions in this case and *Cotton* are the logical and consistent results of the application of the general rule established in the seminal case of *Kenai Oil and Gas, Inc. v. Dept. of Interior*, 671 F.2d 383 (10th Cir. 1982) (hereinafter *Kenai*), a case not cited to by Woods.[16]

In *Kenai*, the Tenth Circuit established the general rule that the Secretary, acting as a trustee in overseeing the economic and conservation interests of tribes in the

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[16] Woods' failure to cite the Tenth Circuit's decision in *Kenai Oil and Gas, Inc. v. Dept. of Interior*, 671 F.2d 383 (10th Cir. 1982), a case directly addressing the issues in this case and upon which the Tenth Circuit premised its decisions in both this case and *Cotton* (the case upon which Woods bases this appeal), arguably violates Sup. Ct. R. 14.5, which states, "The failure of a petitioner to present with accuracy, brevity, and clearness *whatever is essential to a ready and adequate understanding of the points requiring consideration* will be a sufficient reason for denying the petition." (emphasis added).

development of their mineral resources, must consider all relevant factors impacting these interests when making any decision involving tribal oil and gas leases. 671 F.2d at 383, 386-387, *citing Gray v. Johnson*, 395 F.2d 533, 536 (10th Cir.), *cert. denied*, 393 U.S. 906 (1968); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-416 (1971).[17] In *Kenai*, the Tenth Circuit upheld the Secretary's disapproval of a communitization agreement because he had considered all the relevant factors, and thus, "properly exercised his judgment and discretion in refusing to approve the proposed communitization agreements." 671 F.2d at 388. The factors relevant to the Secretary's decision in evaluating a proposed communitization agreement include conservation and economic concerns. *Cotton*, 870 F.2d at 1517; *citing Kenai*, and the Guidelines for the approval of communitization agreements, adopted on April 23, 1982, and published in the Federal Register, 47 FR 26920.

The decisions in the instant case and in *Cotton* apply the *Kenai* rule, and establish consistent corollary rulings. In *Cotton*, the Tenth Circuit struck down the Secretary's approval of a communitization agreement because he had considered only the economic factor, and ignored all

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[17] This Court stated in *Overton Park* that the reviewing court must scrutinize the facts to determine "whether the Secretary's decision was not arbitrary, capricious, or otherwise not in accordance with the law." 401 U.S. at 416; 5 U.S.C. § 706(2)(A). "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors . . . ." 401 U.S. at 416; *Kenai*, 671 at 386; *Cotton*, 870 F.2d at 1525.

other relevant factors.[18] And in the instant case, the Tenth Circuit struck down the Secretary's approval of the communitization agreements because he had considered only the conservation factor, and ignored the economic factor.

Thus the general rule established by the Tenth Circuit in *Kenai* was applied consistently in the present case and in *Cotton*. These cases provide no support for Woods' claim of an intra-circuit conflict.

III. THIS COURT SHOULD DENY THE PETITION BECAUSE THE DECISIONS BELOW TURN ON UNIQUE FACTS UNLIKELY TO REOCCUR.

The decisions below, holding that the tribal leases expired due to the Secretary's failure to consider the market value/marketability factor before he approved the communitization agreements, turn on circumstances unique to the early 1980s which are unlikely to reoccur. The early 1980s experienced a phenomenal oil and gas boom period in the region where the leases are located. As stated by the Tenth Circuit:

> Unusual conditions existed in the Anadarko area in the early 1980s. The record establishes that the Area Director reported to the Secretary that deep gas discovery in the Anadarko area

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[18] As the Tenth Circuit stated in *Cotton*:

> In any event, as previously discussed herein, the Secretary simply failed to set forth, discuss and analyze all of the factors his own guidelines and our *Kenai* opinion required of him. . . .

Cotton, 870 F.2d at 1527.

> had prompted a short period of astronomical bids on advertised mineral tracts.

Cert. App. 13. Besides the instant case, this boom period gave rise to only three other cases in the Tenth Circuit involving questions of whether the Secretary acted properly in approving or disapproving communitization agreements. *See, Kenai, Cotton,* and *Woods Petroleum Corp. v. Dept. of Interior,* CIV-86-1623-A (W.D. Okla, filed 1986) (now pending on appeal to the Tenth Circuit). As indicated by the Tenth Circuit, the boom period was short-lived.

Additionally, the conflict in the instant case preceded the Secretary's promulgation of Guidelines to be followed by Bureau of Indian Affairs officials in evaluating communitization agreements. The subject tribal leases expired on May 10, 1981, and the Secretary's Guidelines were adopted on April 23, 1982, as a result of the Tenth Circuit's decision in *Kenai. See,* Cert. App. 100-101, and 107-109; 47 FR 26920; and *Cotton,* 870 F.2d at 1517, *citing Kenai.* Such Guidelines are intended to prevent the Secretary and his delegates in the future from ignoring relevant factors, such as occurred in this case.

Thus, the questions presented by the Petition, while important to the parties, are unlikely to have widespread recurring significance, and thus do not rise to a level of public importance that would warrant review by this Court. *See, e.g., Rice v. Sioux City Memorial Parks Cemetery,* 349 U.S. 70, 74, 79 (1955).

CONCLUSION

Based upon the foregoing points and authorities, the Cheyenne-Arapaho Tribes of Oklahoma respectfully submits that this Court should deny Woods' Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, Plaintiff,	)	No. CIV-84-1765-A
v.	)	
UNITED STATES OF AMERICA, et al.,	)	

ORDER

(Filed May 31, 1989)

This matter is before the Court for consideration of the Motion to Vacate Order of June 27, 1988 granting Woods Leave to Deposit Royalty Funds Into Court Registry and Alternatively Motion to Modify Order, filed by the plaintiff, the Cheyenne-Arapaho Tribes of Oklahoma (the Tribe). The Woods Petroleum Corporation (Woods) has responded.

In its June 27, 1988 order, the Court granted Woods leave to deposit in the Court registry certain proceeds from the Hughes No. 2-29 well in section 29 of Custer County. The proceeds constitute royalty funds attributable to the Tribe's lands within section 29. In support of its Motion to Vacate, the Tribe now argues that the deposited funds are not at issue in this case and that, as a result, Rule 67 of the Federal Rules of Civil Procedure does not authorize their deposit with the Court.

Since the Hughes No. 2-29 well is located on a tract that is not owned by the Tribe, the Tribe's entitlement to the subject royalty funds is based on the communitization agreement for section 29. The Tribe maintains that since it has not challenged that part of the communitization agreement that establishes a unit for section 29, it is entitled to the subject royalty funds regardless of the disposition of the instant case.

In response, Woods contends that the Tribe has challenged the validity of the section 29 communitization agreement as a whole. According to Woods, if the Tribe prevails in this action, the section 29 communitization agreement will be deemed void in all respects, and the Tribe will not be entitled to any proceeds from the Hughes No. 2-29. Thus, Woods concludes, the subject royalty funds are in dispute, and deposit with the Court is warranted.

Upon review of the record, the Court finds the Tribe's argument unpersuasive. The question of the proper distribution of proceeds from the Hughes No. 2-29 well if the section 29 communitization agreement is deemed invalid has not yet been determined. Moreover, Woods' contention that the communitization agreement must be either enforced or voided as a whole finds some support, arguably, in certain language in the Tenth Circuit's recent decision in *Cotton Petroleum Corp. v. Department of the Interior*, 870 F.2d 1515, 1527 (10th Cir. 1989). Thus, deposit

of the subject funds with the Court remains appropriate.[1] Accordingly, the Tribe's Motion to Vacate is Denied.

/s/ Wayne E. Alley
WAYNE E. ALLEY
United States
District Judge

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[1] In the alternative, the Tribe has requested the Court to modify its June 27, 1988 order to clarify that Woods is not authorized to deposit royalties from the lease granted by the Tribe to Reading and Bates Petroleum Company for the NE/4 of section 29. The Tribe argues that since Reading and Bates is not a party to this case and since the Reading and Bates' lease is not at issue in this case, royalty monies from that lease are not here in dispute.

For the reasons stated above, the Court does not find succh [sic] modification of the June 27, 1988 order appropriate. The Tribe has challenged the instrument that entitles it to royalties from the Hughes No. 2-29 well that are attributable to the Reading and Bates lease (i.e. the communitization agreement for section 29). The impact of the Tribe's challenge on the distribution of funds in section 29 has yet to be determined, and deposit of the funds with the Court is therefore justified.

Supreme Court, U.S.
FILED
MAR 3 1993
OFFICE OF THE CLERK

Nos. 92-970 and 92-1286

In the Supreme Court of the United States

OCTOBER TERM, 1992

WOODS PETROLEUM CORPORATION, PETITIONER

v.

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, ET AL.

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, PETITIONER

v.

WOODS PETROLEUM CORPORATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a decision by the Secretary of the Interior to approve "communitization" agreements covering certain oil and gas leases made by an Indian tribe arbitrarily and capriciously failed to consider the economic best interests of the tribe, and if so whether the case should have been remanded to the Secretary for reconsideration of that issue.

2. Whether a "commence drilling" clause of a type common in oil and gas leases violates the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a-396g, when included in a lease made by an Indian tribe.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 1-17) is reported at 966 F.2d 583. The opinions of the district court (Pet. App. 18-60, 61-85) are unreported.

[1] Unless otherwise indicated, "Pet." and "Pet. App." refer to the petition and appendix in No. 92-970.

The opinions of the Board of Indian Appeals (Pet. App. 110-120, 137-145) are reported at 91 Interior Dec. 229 and 90 Interior Dec. 61.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1992. A petition for rehearing was denied on November 2, 1992. Pet. App. 155.[2] The petition for a writ of certiorari in No. 92-970 was filed on December 7, 1992, and the petition in No. 92-1286 was filed on February 1, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases involve four leases entered into between the Cheyenne-Arapaho Tribes of Oklahoma (the Tribe) and Woods Petroleum Corporation (Woods), providing for the development of oil and gas resources underlying certain tribal lands. Three of those leases (at issue in No. 92-970) expired by their terms in 1981, unless certain "communitization" agreements entered into by Woods as lessee were properly approved by the Department of the Interior (the Department) and therefore legally effective to extend the period of the leases. The status of the fourth lease (at issue in No. 92-1286) depends at least in part on whether a "commence drilling" clause, which is common in such leases, is void under the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a. If

[2] The Cheyenne-Arapaho Tribes of Oklahoma filed a second petition for rehearing on December 17, 1992. The court of appeals denied that petition as untimely on January 5, 1993. On January 15, 1993, the Tribe lodged with the court of appeals a motion for leave to file another rehearing petition out of time.

the leases had expired in 1981, it is possible that because of changed market conditions the Tribe would have been able to negotiate new leases for substantially greater compensation. See Pet. App. 13-14.

1. Oil and gas leasing by Indian tribes is governed primarily by the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a-396g, and relevant regulations at 25 C.F.R. Pt. 211, formerly 25 C.F.R. Pt. 171 (1981). Although the Indian tribes are the lessors under the 1938 Act, the leases and their administration are subject to fiduciary approval and oversight by the Secretary of the Interior, acting through the Bureau of Indian Affairs. Pet. App. 11-12; see generally *Jicarilla Apache Tribe* v. *Supron Energy Corp.*, 728 F.2d 1555, 1564-1565 (1984) (opinion of Seymour, J.), adopted, 782 F.2d 855 (en banc), supplemental opinion, 793 F.2d 1171 (10th Cir.) (en banc), cert. denied, 479 U.S. 970 (1986). Cf. *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 372, 374-375 (1968) (similar federal oversight of leases by Indian allottees).

In 1976 the Tribe entered into four oil and gas leases with Woods, each comprising a 160-acre quarter section in Custer County, Oklahoma. See Pet. App. 131 (chart), 136 (map); 92-1286 Pet. App. 88 (map). Each lease was for a primary term of five years from the date it was approved by the Department of the Interior, plus "as much longer thereafter as oil and/or gas is produced in paying quantities from [the leased] land." Pet. App. 54 (quoting leases). Each lease also contained a "commence drilling" clause, common in oil and gas leases (see *id.* at 55-57), under which the term of the lease would be conditionally extended beyond the primary term so

long as drilling was commenced within that term.[3] Without extension, the basic five-year term of each lease would have expired on May 10, 1981. *Id.* at 131.

Each lease also contained a "unit operation" clause. See Pet. App. 3-4. Large oil and gas deposits underlying land held by various owners are commonly developed under a unitary plan in order to ensure efficient recovery of the entire deposits. Costs and revenues of production for the development unit as a whole are typically allocated among those with ownership interests in the unit. In Oklahoma, the formation and continuation of such units come under the jurisdiction of the Oklahoma State Corporation Commission. In 1980, the Commission established 640-acre drilling and spacing units for survey sections 29 and 32, at issue here. See *id.* at 20, 136. Actual drilling is typically permitted at only one location in a given spacing unit.

The state Commission does not have the power to order Indian lands pooled into a spacing unit. See, *e.g.*, Pet. App. 119. Joinder of Indian tracts is instead achieved through a "communitization agreement," which must receive both the consent of the tribal lessor and the approval of the Secretary of the Interior. See, *e.g.*, 25 C.F.R. 211.21(b) (formerly 25 C.F.R. 171.21(b) (1981)); 25 U.S.C. 396d. See also *Samedan Oil Corp.* v. *Cotton Petroleum Corp.*, 466 F.

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[3] "If the lesse[e] shall commence to drill a well within the term of this lease, the lessee shall have the right to drill such well to completion with reasonable diligence and if oil or gas or either of them be found in paying quantities this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned." Pet. App. 54 (quoting leases).

Supp. 521, 526 (W.D. Okla. 1978); *Kardokus* v. *Walsh*, 797 P.2d 322, 324-325 (Okla. 1990). In recognition of the likelihood that such agreements would be entered into with respect to the individual tracts at issue here, and of the need for consent and approval, each lease contained a "unit operation" clause (Clause 9), which provided:

> The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the lease[d] lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

Pet. App. 3 (quoting leases).

Under a communitization agreement, drilling operations and production occurring anywhere within the communitized area are deemed to occur on each tract within the area for purposes of the development lease on each tract. Pet. App. 3-4; *id.* at 57-58 (quoting agreement). Thus, a valid communitization agreement covering one or more of the leases at issue here, in conjunction with each lease's commence drilling clause, would automatically extend the primary term of each covered lease if drilling was commenced on any tract within the communitized area prior to the May 10, 1981 expiration date in the lease. *Id.* at 3-4.

2. On April 1, 1981, Woods entered into two communitization agreements with Reading & Bates Petroleum Co., the owner of the remaining leases in survey sections 29 and 32. Pet. App. 4. See also *id.* at 136; 92-1286 Pet. App. 88 (maps). The agreements pooled the mineral interests in each section, and in

each case designated Reading & Bates as the unit operator. Pet. App. 4. Drilling operations had commenced in November 1980 on the northeast quarter of section 29, which was leased by the Tribe to Reading & Bates. *Id.* at 20. On May 6, 1981, four days prior to expiration of the five-year primary term of the Woods leases, Reading & Bates commenced drilling on the northwest quarter of section 32, which was leased by the Tribe to Woods. *Ibid.* As explained above, if the communitization agreements were legally effective, then commencement of drilling on one tract in each communitized section automatically extended the term of each of the Woods leases.

Reading & Bates failed to obtain the Tribe's consent to the communitization agreements with Woods. The Tribe believed that because of market conditions prevailing in the leased area at the time, the leases should be allowed to expire and renegotiated for substantially increased compensation. See, *e.g.*, Pet. App. 4, 21, 45-46.[4] Reading & Bates nonetheless submitted the agreements for approval by the Department of the Interior on May 5, 1981. *Id.* at 4-5. On May 8, 1981, the Acting Area Director of the Anadarko Area office of the Department's Bureau of Indian Affairs (BIA) approved both agreements. *Id.* at 5. The Tribe appealed to the Deputy Assistant Secretary of the Interior, who affirmed the Area

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[4] The courts below noted (Pet. App. 13-14, 45) that the Woods leases were negotiated in 1976 at a rate of $35 per acre and a 16 2/3% royalty, whereas the Tribe was able to lease two other tracts in the same sections (and same proposed communitized areas) to Reading & Bates in February 1980 for $235 and $315 per acre, respectively, in each case with a 20% royalty. See also *id.* at 136; 92-1286 Pet. App. 88 (maps).

Director's decision on February 9, 1982. *Id.* at 5, 153-154. On February 10, 1983, the Department's Board of Indian Appeals affirmed the Deputy Assistant Secretary's decision. *Id.* at 5, 137-152.

The Board subsequently granted the Tribe's petition for rehearing. It also requested additional information from the BIA concerning whether the Acting Area Director, before approving the communitization agreements, had considered whether the long-term economic effects of those agreements would be in the best interest of the Tribe. Pet. App. 5, 114-115, 119-120.[5] After reviewing the additional information supplied by the BIA, *id.* at 121-136, the Board concluded that he had. *Id.* at 119-120. On May 18, 1984, the Board sustained its previous decision.

3. The Tribe then commenced this suit in the district court, seeking (on a variety of grounds) a declaration that all four leases with Woods had expired at the end of their primary terms on May 10, 1981. Pet. App. 22-23. On review of the administrative record (and at the Tribe's request, *id.* at 61-62), the district court remanded the matter to the Department for responses to a number of questions,

[5] This inquiry was required under Department guidelines issued in April 1982, almost a year after the Area Director had approved the communitization agreements at issue here, in order to assist BIA officials in evaluating and approving or disapproving such agreements. Pet. App. 107-109. See also *id.* at 73, 112, 148-150; 47 Fed. Reg. 26,920 (1982). The 1982 guidelines were issued in response to the decision in *Kenai Oil & Gas, Inc.* v. *Department of the Interior of United States*, 671 F.2d 383 (10th Cir. 1982), which held that Department approval of communitization agreements was governed by fiduciary standards that required consideration of the economic interests of the Indian lessor. Pet. App. 72-73.

id. at 83-85, including whether the BIA Area Director had considered "evidence of the market value and marketability of new leases that could have been negotiated had the communitization agreements not been approved." *Id.* at 84. In March 1987 the Department filed a detailed response, *id.* at 86-109, which informed the court, *inter alia*, that in making his decision "[t]he Acting Area Director did not consider any evidence of the market value and marketability of new leases." *Id.* at 94.

In May 1989 the district court granted partial summary judgment in favor of the Tribe. Pet. App. 59-60. The court found that the Acting Area Director breached his fiduciary responsibility to the Tribe by approving the communitization agreements without adequately considering then-current economic conditions or "exploring any options," such as the possible benefits to the Tribe of disapproving the agreements and thus allowing termination and renegotiation of the leases. *Id.* at 51. The court acknowledged that the Acting Area Director's action "might be supportable" if it had been "based on the study of conditions prevailing at that time," but found that it was not based on any such study. *Ibid.* The court therefore held that the communitization agreements at issue had not been properly approved and were not effective to extend the terms of the three Woods leases covering tracts on which no wells had actually been drilled. *Id.* at 51-52, 60.

The fourth Woods lease, which covered a tract on which drilling had in fact commenced, was extended beyond the initial five-year term by its own "commence drilling" clause. It accordingly was not affected by the district court's invalidation of the

communitization agreements. With respect to the fourth lease (as well as the others), the Tribe argued, *inter alia*, that the "commence drilling" clauses in the leases were void because they conflicted with the terms of the Indian Mineral Leasing Act of 1938. Pet. App. 22.[6] The district court rejected that argument, concluding that neither the 1938 Act nor applicable precedents supported the Tribe's position. *Id.* at 55-57. The court thus rejected the legal grounds proffered by the Tribe in contending that the fourth lease expired in 1981,[7] although it entered no definitive order concerning the validity of that lease. See *id.* at 59-60.

The district court certified its decision for immediate appeal under 28 U.S.C. 1292(b), and the court of appeals granted Woods and the Tribe leave to appeal. See Pet. App. 7-8; 92-1286 Pet. 9 & n.10. The federal respondents did not join in either petition for appellate review and did not participate in briefing or argument before the court of appeals.

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[6] The Indian Mineral Leasing Act provides that tribal lands may be leased for mining purposes "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." 25 U.S.C. 396a. The Tribe contended (as it contends in its petition in No. 92-1286) that under this statutory language a lease may be extended only by the actual production of minerals in paying quantities during the primary term of the lease. See Pet. App. 53-54.

[7] The Tribe also argued that the communitization agreements amended the leases to require actual production, rather than commencement of drilling, in order to extend their terms. The district court rejected that argument as improperly raised and substantively unpersuasive, Pet. App. 57-59, and the Tribe does not renew it in this Court.

4. The court of appeals agreed with the district court that the BIA's Acting Area Director had abused his discretion in approving the communitization agreements at issue without considering what would be in the economic best interests of the Tribe in light of the unusual market conditions at the time of the decision. Although the Department had taken the position on remand from the district court that disapproval of the agreements would have resulted in the loss of several leases that probably could not be successfully renegotiated under the threat of litigation from the former lessees, see Pet. App. 14, the court of appeals held (*id.* at 16):

> The Area Director was not free to conclude, without some consideration of the present market conditions, that new leases would be as difficult to negotiate as they would have been in pre-boom times. Absent consideration of current market developments, the Area Director's conclusion that he could not protect the Tribe's economic interests if the communitization agreements were disapproved was inconsistent with the agency's fiduciary obligations to the Tribe.

On this basis, the court concluded that in approving the agreements without more detailed consideration of the Tribe's economic interests, the Department had breached its fiduciary responsibilities to the Tribe. Like the district court, the court of appeals did not remand the case to the Department for reconsideration of the communitization agreements in light of the additional factors outlined by the court. It instead affirmed the district court's judgment that the communitization agreements were not valid and that

the three leases under which drilling had not commenced as of May 10, 1981, had therefore expired on that date. *Id.* at 17.

The court of appeals explicitly noted the Tribe's contention that the commence drilling clause in all four leases conflicted with the Indian Mineral Leasing Act and that all four leases therefore expired in 1981 for failure to achieve actual production in paying quantities before the end of the primary term. Pet. App. 8. The court believed, however, that its ruling on the abuse of discretion issue would "effectively dispose of [the] action," *ibid.*, and it therefore declined to address the statutory issue or to enter a judgment affecting the status of the fourth lease. *Id.* at 17.

ARGUMENT

We do not concede that the BIA abused its discretion in approving the communitization agreements at issue in this case. The decision on that issue below, however, merely applied settled law to a specific set of facts. That decision does not conflict with any decision of this Court or of any other court of appeals, and it does not merit plenary review. Moreover, although we agree that the court of appeals should have decided the Indian Mineral Leasing Act question relevant to the status of the fourth Woods lease, in the absence of consideration by the court of appeals the district court's ruling on that question is not ripe for interlocutory review by this Court.

1. Woods' primary contention (Pet. 8-11) is that the court of appeals erred by "rendering the approval of the Woods Communitization Agreements void without remand" to the Department of the Interior for recon-

sideration in light of the specific market factors identified as relevant by the court. Pet. 8.[8] We agree that if an administrative agency "has not considered all relevant factors, * * * the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985); see also, *e.g.*, *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1093-1094 (10th Cir. 1988). But not every error in a court of appeals' disposition of a case warrants correction by this Court, and we do not believe that the remand issue here warrants review. See *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984); *Maine* v. *Taylor*, 477 U.S. 131, 136 n.5 (1986). The question whether, applying standards set forth in Department guidelines and proposed regulations[9] and accepted by

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[8] In *Cotton Petroleum Corp.* v. *United States Department of the Interior*, 870 F.2d 1515, 1528 (1989), relied on by Woods and discussed below, the Tenth Circuit similarly refused (over the government's objection) to remand a factually similar case to the Department for reconsideration.

[9] See notice of proposed rulemaking, 56 Fed. Reg. 58,734 (1991), comment period reopened, 57 Fed. Reg. 40,298 (1992). As proposed, 25 C.F.R. 211.28 would amend and expand upon current Section 211.21(b), which governs approval of communitization agreements. Proposed Section 211.28(a) provides that approval must be "advisable and in the best interest of the Indian owner." 56 Fed. Reg. 58,741 (1991). "In the best interest of the Indian mineral owner" is newly defined by proposed Section 211.3, 56 Fed. Reg. 58,738 (1991), which provides that the BIA, in considering

> whether it is "in the best interest of the Indian mineral owner" to take a certain action (such as approval of a * * * communitization agreement), * * * may consider any relevant factor, including, but not limited to, economic

the parties, the Department abused its discretion in approving the Woods communitization agreements is of little importance to anyone but the parties in this case. See, *e.g.*, *Dobbs* v. *Zant*, 113 S. Ct. 835, 837 (1993) (Scalia, J., concurring in the judgment).

2. Woods further contends (Pet. 11) that the decision below conflicts with *United Nuclear Corp.* v. *United States*, 912 F.2d 1432 (Fed. Cir. 1990). In that case, the court found that although a mining plan submitted by United Nuclear satisfied all legal and regulatory requirements, the Department had refused to approve it without the consent of the tribal lessor, effectively granting the tribe a veto power not contemplated in the regulatory scheme or in prior practice or negotiations. *Id.* at 1433-1434. Because United Nuclear was unable to start mining without the consent that the tribe had withheld, the lease eventually lapsed according to its terms. *Id.* at 1433.

The *United Nuclear* majority concluded that in that case the Department, without independent analysis and in the absence of any legal or contractual requirement, had abdicated its responsibility to exercise discretion and had simply deferred to the tribe. 912 F.2d at 1436-1438. Acknowledging that differentiating between exercises of regulatory authority and government "takings" was "a close, difficult, and complex process," the majority held that on the particular facts presented, the Department's

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considerations such as date of lease expiration, probable financial effect on the Indian owner, leasability of land concerned, need for change in the terms of the existing lease, marketability, and potential environmental, social, and cultural effects.

actions amounted to a taking of United Nuclear's contractual rights. *Id.* at 1435.

The record in this case discloses no abdication of independent decision-making by either the Department or the courts below. The Department's decision to approve the communitization agreements, which Woods supports, of course did not "defer" in any respect to the wishes of the Tribe. The courts, on the other hand, concluded that the Department had failed to consider the economic interests of the Tribe adequately in light of existing market conditions, and had therefore breached a specific legal responsibility to the Tribe. Unlike in *United Nuclear*, where the courts found that the proposed mining plan "satisfied all of the requirements" for approval and the Department simply refused to approve them, 912 F.2d at 1433, in this case the courts found that the proposed agreements were not in the economic best interest of the Tribe, and therefore should not have been approved under applicable legal and regulatory standards. Woods, which of course negotiated the leases against a background of pervasive regulation and the Department's fiduciary responsibility toward the Indian tribes, had no vested right to have its leases extended beyond their primary terms by approval of any particular communitization agreements, or to have such approval upheld by reviewing courts. See *Boesche* v. *Udall*, 373 U.S. 472, 485 (1963) (cancellation of mineral lease issued contrary to regulations); *Gray* v. *Johnson*, 395 F.2d 533, 537 (10th Cir.) (revocation of erroneous approval of Indian lease), cert. denied, 392 U.S. 906 (1968). Whatever the merits of the holding in *United Nuclear*, it does not conflict with the decision below.

3. Woods also argues (Pet. 12-13) that the decision below is inconsistent with another decision of the Tenth Circuit, *Cotton Petroleum* v. *United States Department of the Interior*, 870 F.2d 1515 (1989). In *Cotton*, the court of appeals reversed a decision by the Department of the Interior *not* to approve a communitization agreement in circumstances similar to those in this case. The Tenth Circuit held that the Department acted arbitrarily by "refus[ing] to approve an otherwise fair and proper communitization agreement for the *sole purpose* of causing the underlying lease * * * to expire." *Id.* at 1528. The court distinguished its prior decision in *Cotton* on the ground that although its decision here had "the ultimate effect of denying the communitization agreements, that effect is merely the aftermath of the [Department's] failure to consider the prerequisite relevant economic factors in [its] decision to approve the agreements." Pet. App. 16 n.14. *Cotton*, in turn, had distinguished the same court's earlier decision in *Kenai Oil & Gas, Inc.* v. *Department of the Interior of United States*, *supra*, on the ground that in *Kenai* the Department had considered all relevant factors and had disapproved the communitization agreements at issue for all purposes, not (as in *Cotton*) merely for purposes of terminating the leases while retaining the Indian lessors' rights to share in the profits of communitized production. 870 F.2d at 1525-1526, 1528 n.4.[10]

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[10] As the Tribe points out in its brief in opposition (at 9-15) in No. 92-970, the exact extent to which the decisions below invalidated the Woods communitization agreements appears to remain open for consideration on remand in this case.

We agree with Woods that there is tension between the judgments in this case and in *Cotton*, and we likewise find it difficult to reconcile the result in *Cotton* with that in *Kenai*. But although the decisions reach different results on their particular facts, they articulate essentially the same legal standards concerning appellate review of Department actions, the Department's fiduciary responsibility to Indian tribes, and the factors that the Department should consider when asked to approve a communitization agreement.[11] The Tenth Circuit evidently considers the decisions consistent, as indicated by the discussions noted above, by the denial of the government's petition for rehearing and suggestion of rehearing *en banc* in *Cotton*, and by the denial of Woods' and the Tribe's similar petitions in this case.[12] In any event, whatever conflict may exist among decisions of different panels of a single court of appeals can normally be left for resolution by that court. We perceive no extraordinary circumstances that would justify a different result here. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957); R.

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[11] See, *e.g.*, *Kenai*, 671 F.2d at 386-387; *Cotton*, 870 F.2d at 1525-1526; Pet. App. 12-15 (Department must consider all relevant factors in reaching decision on proposed agreement). See also *Kenai*, 671 F.2d at 386; *Cotton*, 870 F.2d at 1525, 1529; Pet. App. 10-13 (approval or disapproval is discretionary and may be set aside only if it is arbitrary or capricious or reflects a clear error of judgment).

[12] Similar issues are once again before the Tenth Circuit, in the context of leases by Indian allottees, in *Woods Petroleum Corp.* v. *Department of Interior*, No. 92-6052 (10th Cir., argued and submitted Jan. 11, 1993).

Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 204-206 (6th ed. 1986).

4. Finally, the Tribe's petition in No. 92-1286 argues that the Court should grant certiorari to consider whether the common "commence drilling" clause contained in the Woods leases violates the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a. As the Tribe concedes (92-1286 Pet. 9-10), the court of appeals adverted to but explicitly declined to decide this issue. Moreover, as the Tribe points out in its brief in opposition in No. 92-970, this Court ordinarily will not review questions not considered or passed upon by the court of appeals. See Br. in Opp. 9-10 & n.11, and cases there cited.

In this case, the district court considered and rejected the Tribe's argument, and the court of appeals granted interlocutory review of the question under 28 U.S.C. 1292(b). We agree that the court of appeals' ultimate decision did not resolve the status of the fourth Woods lease (and therefore did not "effectively dispose of this action," Pet. App. 8), and that having granted review it would have been preferable for the court of appeals to have decided the question at this interlocutory stage. Because it did not do so, however, its judgment can have no preclusive effect on this issue, either in further proceedings in this case or in future cases. See, *e.g.*, *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 4420, 4478 & n.2 (1981 & Supp. 1992). Assuming, therefore, that review is denied in No. 92-970 and the case is returned to the district court for further proceedings, the Tribe will have ample opportunity to raise the Indian Mineral Leasing Act issue once

again on an appeal from the district court's final judgment. We therefore see no reason to depart here from this Court's general practice of not granting review of questions not decided by the court of appeals.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993

Supreme Court, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

No. 92-970

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

Woods Petroleum Corporation,

Petitioner,

vs.

**Cheyenne-Arapaho Tribes of Oklahoma,
United States of America,
Department of the Interior,
Secretary of the Interior,
Anadarko Area Director, Bureau of Indian Affairs,
and Concho Indian Agency Superintendent,**

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Cheyenne-Arapaho Tribes of Oklahoma (the ``Tribe'') and the remaining respondents (the ``Federal Respondents'') have opposed Petitioner Woods Petroleum Corporation's (``Woods'') Petition for Writ of Certiorari, contending that: (1) the courts below have not yet usurped the discretionary authority of the Secretary of Interior (the ``Secretary''), (2) no inter- or intra-circuit conflict exists upon which to base certiorari, and (3) no issue of sufficient gravity to warrant review is present. These contentions have no basis in law and ignore the facts below.

REPLY TO COUNTERSTATEMENTS OF THE CASE

The Tribe asserts, wholly without supporting citation, that Woods has ``grossly mischaracterize[d] the facts and proceedings in this case.'' Brief In Opposition To Petition For A Writ Of Certiorari (the ``Tribe's Opposition'') at 1. This assertion is simply wrong. The facts giving rise to this dispute and the proceedings below are accurately set forth in Woods' Statement of the Case and fully supported by the Certiorari Appendix. Thus, the Tribe's naked assertions of mischaracterization provides no proper basis to oppose certiorari.

Woods does not dispute the factual assertions set forth by the Federal Respondents in their Brief For The Federal Respondents In Opposition (the ``Federal Opposition''). Woods does take exception to the extent that the Federal Respondents imply that Woods was obligated, despite Section 9 of the Woods Leases, to obtain additional tribal consent to communitization. Federal Opposition at 6.

REPLY TO ASSERTED REASONS FOR DENYING THE WRIT

Respondents assert various reasons that certiorari should be denied. However, none of these reasons is supported by the existing law or the appellate record.

I. CERTIORARI IS NOT PREMATURE

The Tribe contends that a grant of certiorari would be premature because ``the lower courts have not yet addressed the question of whether the communitization agreements should be given effect in whole or in part.''[1] *Id.* at 9. This argument ignores the express rulings of both the district court and the Court of Appeals, as well as existing law.

The Court of Appeals has ruled that the Secretary failed to consider lease-market conditions as one of the economic factors in his review of communitization. However, the Court of Appeals went on to conclude that, notwithstanding the Secretary's exclusive grant of discretionary authority to approve communitization *even after weighing this additional factor*, the Woods Communitization Agreements were void. Respondents argue that this does not constitute judicial usurpation of the Secretary's discretionary authority -- yet. This argument, of course, begs the very question presented by this appeal: May a court, rather than the Secretary, who has been vested with the exclusive decisional authority, conclude that the final rejection of a proper plan of communitized development is mandated as a matter of law, because the Secretary failed to consider one of several factors in his prior review?[2]

The Tribe represents to this Court that the courts below ``expressly reserved'' and ``expressly stated'' that the Woods Communitization Agreements were not void ``in toto.'' Tribe's Opposition at 10-11. This representation is patently untrue. The district court, in its May 26, 1989 order, reserved

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[1]The Federal Respondents, while not adopting this argument, appear to concur with the Tribe. Federal Opposition at 15 n.10.

[2]If, on remand to the Secretary, he determined that communitization should be approved, even in light of a new factor, the approval would relate back to the date of the communitization agreements' submission to the Secretary, thus preserving the original Indian leases. *See Cotton Petroleum Corp. v. United States Dep't of Interior*, 870 F.2d 1515, 1523 n.1 (10th Cir. 1989).

only the question of the distribution of revenues, *assuming the invalidity of the communitization agreements.* Tribe's Resp. App. at 2.[3] There is no portion of the district court's order that even hints that the court's finding of invalidity as to the communitization agreements would be the subject of further review. *Id.*

Similarly, the suggestion that the Court of Appeals found the Woods Communitization Agreements to be anything but totally invalid, strains the limits of credulity. The Court of Appeals ``expressly'' held that:

> [T]he communitization agreements *are not valid*, and the leases upon which drilling had not commenced as of May 10, 1981 expired on that date.

Court of Appeals Opinion, Cert. App. at 17 (emphasis added). There exists no good faith basis to the claim that the Court of Appeals, in some way, did not mean what it said, that its finding of invalidity was in some way qualified, limited, or for some purposes but not for others.[4] Thus, the rulings below have impermissibly crossed the boundary

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[3]The Tribe urges that the district court should be allowed to make final revenue distribution decisions, based on the Court of Appeals' improper ruling, before this Court intervenes. Such an argument flies in the face of the very purpose of an interlocutory appeal pursuant to 28 U.S.C. §1292(b) -- to avoid further proceedings when the threshold legal ruling is determinative and may be in error. *See, e.g., Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 70 S. Ct. 322, 94 L. Ed. 299 (1950); *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 363 (3d Cir. 1975). *See also* Fed. R. Civ. P. 1.

[4]Respondents' argument that the courts below may, after finding the Woods Communitization Agreements to be invalid, make additional rulings that these same agreements are now valid for some limited purpose is legally insupportable. *See* Tribe's Opposition at 8-9; Federal Opposition at 15 n. 10. Not only did such a ruling never come from either the district court or the Court of Appeals, but such a ruling, if made, would have flown squarely in the face of *Cotton*. *Id.*, 870 F.2d at 1527.

between exclusive administrative authority and judicial review, making certiorari from this Court proper.

II. CERTIORARI IS NECESSARY TO SUPERVISE THE COURTS BELOW

Respondents contend that the courts below have not acted in any manner sufficient to invoke this Court's supervisory authority. This contention ignores the rulings below.

A. The Rulings Below Usurp The Exclusive Discretionary Authority Of The Secretary.

Respondents argue that, because the Court of Appeals did not expressly direct the Secretary how to rule, there is no usurpation of the Secretary's authority. Tribe's Opposition at 7. This argument simply ignores the fact that the *result* of the Court of Appeals' ruling is to absolutely foreclose any exercise of discretion by the Secretary.

Exclusive discretionary authority to review and approve plans for the communitized development of Indian mineral interests has been conferred on the Secretary. 25 U.S.C. § 396d. During judicial review of such a decision by the Secretary, a ``court is not empowered to substitute its judgment for that of the agency.'' *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). *See Rust v. Sullivan*, ___ U.S. ____, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991); *National Indian Youth Council v. Bruce*, 485 F.2d 97, 99-100 (10th Cir. 1973), *cert. denied*, 417 U.S. 920, 94 S. Ct. 2628, 41 L. Ed. 2d 226 (1974).

However, despite this express boundary for judicial review, the Court of Appeals did not, upon finding that the Secretary had erroneously failed to consider a relevant factor in his approval process, remand the matter to the Secretary with instructions to exercise his discretionary authority under appropriate guidelines. Instead, the Court of Appeals'

conclusion of invalidity was the same as a determination that the Secretary would have disapproved the Woods' Communitization Agreements had he considered this factor. Cert. App. at 17.

It is the Court of Appeals' determination that final rejection of the Woods Communitization Agreements was within its province, and not the province of the Secretary, that constitutes the ``unprecedented usurpation of the Secretary's congressionally conferred authority'' that is complained of by Woods. Petition for Writ of Certiorari at 9.[5]

B. The Courts' Rulings Conflict With Existing Law.

Respondents also argue that no real conflict is present between the rulings of the courts below and the existing law as articulated in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990) and *Cotton*. Respondents' attempts to reconcile this conflict, however, must fail.

In *United Nuclear*, the Court of Appeals for the Federal Circuit specifically held that the refusal of the Secretary, at the request of tribal authorities, to approve a proper cooperative development plan involving Indian mineral interests, in order to cause existing Indian leases to expire, constituted an unconstitutional taking of the mineral lessee's property. *Id.*, 912 F.2d at 1438. This exact same result, the disapproval of the Woods Communitization Agreements

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[5]The Tribe's reference to *Kenai Oil & Gas, Inc. v. Department of Interior*, 671 F.2d 383 (10th Cir. 1982), does not avoid the Court of Appeals' error here. While it is true that in *Kenai*, the Tenth Circuit affirmed that economic factors could be ``relevant'' and ``may'' be considered *by the Secretary* in the review of communitization, *id.* at 387, the court affirmed the Secretary's exercise of discretionary authority in disapproving a communitization agreement. *Id.* at 388. That ruling in no way validates the Court of Appeals' ruling here, preventing the Secretary from exercising that same discretionary authority. The Tribe's accusation that Sup. Ct. R. 14.5 has been violated by failing to refer to this case is, thus, specious. Tribe's Opposition at 15 n.16.

causing the expiration of existing Indian leases, was mandated by the Court of Appeals here. Cert. App. at 17.

The Tribe attempts to resolve this inconsistency by suggesting that in *United Nuclear*, the Secretary ``delegated'' his authority whereas here, the Secretary ``exercised'' that authority. Tribe's Opposition at 14. The Federal Respondents agree with the Tribe, suggesting that in *United Nuclear*, unlike here, the Secretary was guilty of the ``abdication of independent decision-making.'' Federal Opposition at 14. These distinctions in no way address the conflict between the holdings of the two cases.

In *United Nuclear*, the court was presented with the same ``economic realities'' as the courts below. In each case, Indian mineral lessors contended that they could negotiate better leases if their existing lease could first be caused to lapse. The Federal Circuit correctly held that this factor could not justify a taking of the lessee's right to develop its lease in the customary manner. Id. at 1436 (``United justifiably believed and expected that if its mining plan met the [regulatory] requirements, the Secretary would approve it''). The property rights of Woods here are no different than the rights of the lessee in *United Nuclear*.[6] Accordingly, the

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[6]In fact, the Secretary warned the district court that:

> Spacing and pooling are a way of life in Oklahoma oil and gas management. The fact that pooling is almost always necessary in Oklahoma is something that lessees, lessors, etc., are aware of, particularly, in relation to leasing for and exploration of deep gas where 640 acres spacing prevails. The Anadarko Area's leases contain what is referred to as a pooling clause. This clause permits lessors to share proportionately in all royalties from the designated unit well located within the spacing area. . . . Lessees, therefore, when bidding on leases do so with the general knowledge that their area of interest is either spaced at 640 for deep gas, or will be, and that only one well per that area may be allowed. Lessors are also aware of this factor. Naturally, they enter into a contract in the belief that the acquired leasehold allows them to develop or to become part of a unit, and to otherwise share rights in the same reservoir.

Cert. App. at 97-98.

Secretary properly approved reasonable communitization agreements submitted during the term of the Indian leases.[7]

The Federal Respondents attempt to direct attention away from this conflict by noting that the processes that resulted in the taking, *i.e.*, ``abdication'' of authority in *United Nuclear* and usurpation of authority here, are different. This is true. However, it is the result -- *the unconstitutional taking* -- that is prohibited by *United Nuclear*, and that was allowed by the Court of Appeals in this case.

In *United Nuclear*, it was the Secretary that occasioned the unconstitutional taking by refusing to approve a proper cooperative development plan. Here, the Secretary acted properly, approving communitization, *but the Court of Appeals* substituted its judgement for the Secretary's and effected the same type of unconstitutional taking. Thus, it is the Court of Appeals' ruling, not the Secretary's decision, that is directly contrary to *United Nuclear*.

As to *Cotton*, the Tribe's attempted distinction defies logic.[8] The Tribe contends that:

> In *Cotton*, the Tenth Circuit struck down the Secretary's approval of a communitization agreement because he had considered only the economic factor, and ignored all other relevant factors.

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[7]The Federal Respondents assert that Woods has ``no vested right to have its leases extended beyond their primary terms by approval of any particular communitization agreements.'' Federal Opposition at 14. The reliance by the United States on *Boesche v. Udall*, 373 U.S. 472, 83 S. Ct. 1373, 10 L. Ed. 2d 491 (1963) and *Gray v. Johnson*, 395 F.2d 533 (10th Cir.), *cert. denied*, 392 U.S. 906, 88 S. Ct. 2056, 20 L. Ed. 2d 1364 (1968) to support this assertion is misplaced. In both these cases, courts upheld governmental authority to cancel leases based on errors, making them void *ab initio*. These rulings have no application here where the Woods Leases, and the rights granted by them, are indisputably valid.

[8]Contrary to the Tribe, the Federal Respondents ``agree with Woods that there is tension between the judgments in this case and in *Cotton*. Federal Opposition at 16.

Tribe's Opposition at 16-17. Quite to the contrary, judicial review in *Cotton* was of the Secretary's *rejection* of a proper communitization agreement for the purpose of causing the expiration of a single existing lease.[9] *Id.*, 870 F.2d at 1517. The only distinction between the two cases is that here the Court of Appeals itself, not the Secretary, attempts to achieve the exact result prohibited by *Cotton*.[10] It is this very inconsistency, Woods urges, that necessitates this Court's exercise of supervisory authority over the Court of Appeals.[11]

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[9]The only ``approval'' of the Secretary that was rejected in *Cotton* was the Secretary's attempt to disapprove communitization in order to cause an existing lease to expire *and then* to approve identical communitization so as to include the same Indian tract as unleased land. *Cotton*, 870 F.2d at 1520-21, 1527. Interestingly, it is this same improper type of ``qualified'' or ``limited'' invalidity that the Tribe urges again in its first argument in opposition to Woods' Petition here. Tribe's Opposition at 9-13.

[10]In *Cotton*, the court held that the review of a communitization agreement must result in a decision based on the merits of communitization and not on a desire to terminate existing leases. 870 F.2d at 1527-28. This exact improper result was sought by the Tribe below, rejected by the Secretary, but erroneously granted by the Court of Appeals.

[11]The Federal Respondents suggest that the Court of Appeals decision in *Cotton* not to remand to the Secretary somehow justifies its failure to do so here. This implication ignores a critical factor underlying the *Cotton* decision. In *Cotton*, the facts underlying communitization were undisputed. *Id.*, 870 F.2d at 1520. Thus, the Court of Appeals was unable to rule that non-inclusion of a single lease in the communitized area for one purpose, but including it for others was arbitrary and capricious *as a matter of law*. *Id.* at 1527-28. Here, a dispute of fact, *i.e.*, whether communitization was in the best interest of the Tribe, exists. The *judicial* resolution of this factual issue usurps the exclusive administrative discretion of the Secretary where *Cotton* did not.

III. SPECIAL AND IMPORTANT QUESTIONS EXIST HERE

Respondents contend that questions of sufficient importance to justify a grant of certiorari are not present here. Woods respectfully disagrees.

The Tribe admits the national importance of the issues presented but argues that the issues are not likely to reoccur. Tribe's Opposition at 18. This conclusion is incorrect. The issues presented here are: (1) the unwarranted judicial intervention into the exclusive discretionary authority of an administrative agency, and (2) an irreconcilable conflict between the rulings of two courts of appeals. Petition at i. In light of the vast mineral holdings of protected American Indians supervised by the United States government, the large monetary value of these interests and the fact that the fundamental tension between the structure of state conservation law and federal Indian law remain the same, disputes such as this will reoccur absent a definitive resolution by this Court.

The Federal Respondents have agreed that the Court of Appeals erred in failing to remand to the Secretary. Federal Opposition at 12 (``We agree that if an administrative agency `has not considered all relevant factors, * * * the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'''') *Id.* (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985). The Federal Respondents, however, assert that this remand issue does not warrant review because it ``is of little importance to anyone but the parties in this case.'' *Id.* at 12-13.[12]

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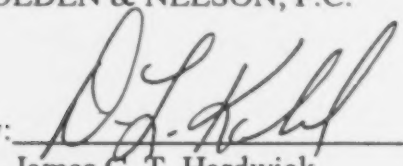
[12]The Federal Respondents' reliance on *Maine v. Taylor*, 477 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986), and *United States v. Mendoza*, 464 U.S. 154, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984), for this proposition is misplaced. In both these cases, the only appellate review issue presented was the government's discretion in determining which actions *it* will appeal. *Taylor*, 477 U.S. at 136 n.5; *Mendoza*, 464 U.S. at 160. These rulings do not in any way minimize the importance of the questions presented by private litigants or the propriety of this Court's grant of certiorari in such cases.

While the unconstitutional taking of Woods' property is certainly most important to Woods itself, the Federal Respondents' position simply ignores the overriding issues -- the federal courts have, without justification, supplanted administrative authority in violation of federal statute. *See* 5 U.S.C. § 706(2)(A). The granting of certiorari and issuance of instructions to the Court of Appeals here will preclude this same dispute from being replayed in a variety of administrative review scenarios not limited to Indian issues.

CONCLUSION

By its rulings below, the Court of Appeals for the Tenth Circuit has chosen to ignore both the exclusive discretionary authority of the Secretary and the precepts of existing law. Woods Petroleum Corporation respectfully requests that this Court grant its Petition for Writ of Certiorari in order to give guidance to the courts below.

Respectfully submitted,
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.



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